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JANUARY - DECEMBER 1986

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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior — Donald P. Hodel

Office of Hearings and Appeals — Paul T. Baird

Office of the Solicitor — Ralph W. Tarr

INDEX-DIGEST

JANUARY - DECEMBER 1986

This index-digest covers all published and unpublished decisions and opinions of the Department of the Interior from January 1, through December 30, 1986, rendered in the Office of Hearings and and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, VA 22203, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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Editor: Rachael Cubbage

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CASE SYMBOLS

ANCAB -- Alaska Native Claims Settlement Act
BIA -- Bureau of Indian Affairs
BLM -- Bureau of Land Management
IBCA -- Interior Board of Contract Appeals
IBIA -- Interior Board of Indian Appeals
M -- Solicitor's Opinion
OHA -- Office of Hearings and Appeals
OSMRE -- Office of Surface Mining Reclamation and Enforcement
SEC -- Office of the Secretary

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46 ——— 14 IBIA 3, 93 I.D. 13 (1986)
47 ——— 14 IBIA 3, 93 I.D. 13 (1986)

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337 ——— 93 IBLA 147 (July 30, 1986)
371 ——— 14 IBIA 223 (Aug. 8, 1986)
372 ——— 14 IBIA 223 (Aug. 8, 1986)
375 ——— 14 IBIA 106 (Apr. 4, 1986)
396a ——— 91 IBLA 208, 93 I.D. 159 (1986)
396a-396g — 91 IBLA 208, 93 I.D. 159 (1986)
396c ——— 91 IBLA 208, 93 I.D. 159 (1986)
396d ——— 91 IBLA 208, 93 I.D. 159 (1986)
450 ——— 14 IBIA 71 (Feb. 26, 1986)
450-450n — 14 IBIA 71 (Feb. 26, 1986)
14 IBIA 87 (Apr. 4, 1986)
14 IBIA 187 (July 25, 1986)
15 IBIA 77 (Dec. 29, 1986)
450a ——— 14 IBIA 71 (Feb. 26, 1986)
450h ——— 14 IBIA 71 (Feb. 26, 1986)
461-479 —— 14 IBIA 46, 93 I.D. 79 (1986)
14 IBIA 260 (Sept. 10, 1986)
15 IBIA 40 (Oct. 30, 1986)
91 IBLA 208, 93 I.D. 159 (1986)
476 ——— IBCA-1962 & 1966, 93 I.D. 136 (1986)
14 IBIA 30 (Feb. 12, 1986)
14 IBIA 46, 93 I.D. 79 (1986)
15 IBIA 40 (Oct. 30, 1986)
477 ——— 15 IBIA 40 (Oct. 30, 1986)
479 ——— 14 IBIA 3, 93 I.D. 13 (1986)
640-26(b) — 90 IBLA 200 (Jan. 30, 1986)
640d ——— 91 IBLA 80 (Mar. 10, 1986)
640d-8 ——— 91 IBLA 80 (Mar. 10, 1986)
640d-10 —— 90 IBLA 200 (Jan. 30, 1986)
640d-10 (a)(1) — 90 IBLA 200 (Jan. 30, 1986)
640d-10 (a)(2) — 90 IBLA 200 (Jan. 30, 1986)
640d-10(b) — 90 IBLA 200 (Jan. 30, 1986)
640d-10(c) — 90 IBLA 200 (Jan. 30, 1986)
640d-12 (c)(2) — 90 IBLA 200 (Jan. 30, 1986)
640d-10 (f)(1) — 90 IBLA 200 (Jan. 30, 1986)
640d-10 (f)(3) — 90 IBLA 200 (Jan. 30, 1986)
640d-12 —— 90 IBLA 200 (Jan. 30, 1986)
640d-13 —— 90 IBLA 200 (Jan. 30, 1986)
1301-1303 — 14 IBIA 71 (Feb. 26, 1986)
1301-1341 — 14 IBIA 71 (Feb. 26, 1986)
1302 ——— 14 IBIA 181 (July 24, 1986)
1302(8) —— 14 IBIA 46, 93 I.D. 79 (1986)
15 IBIA 13 (Oct. 16, 1986)
1901(3) —— 14 IBIA 87 (Apr. 4, 1986)
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14 IBIA 259 (Sept. 9, 1986)
14 IBIA 270 (Sept. 30, 1986)
15 IBIA 1 (Oct. 7, 1986)
15 IBIA 71 (Dec. 2, 1986)
2011(d)(2) — 14 IBIA 45 (Feb. 19, 1986)
2206 ——— 15 IBIA 55 (Nov. 24, 1986)

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2412 ——— 93 IBLA 211 (Aug. 20, 1986)
2412(d)(3) — 93 IBLA 211 (Aug. 20, 1986)

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91 IBLA 124 (Mar. 19, 1986)
92 IBLA 20 (May 6, 1986)
92 IBLA 109, 93 I.D. 211 (1986)
94 IBLA 69 (Sept. 29, 1986)
22 et seq. - M-36955, 93 I.D. 369 (1986)
23 ——— 92 IBLA 109, 93 I.D. 211 (1986)
93 IBLA 1, 93 I.D. 288 (1986)
M-36955, 93 I.D. 369 (1986)
26 ——— 93 IBLA 68 (July 15, 1986)
M-36955, 93 I.D. 369 (1986)
28 ——— 90 IBLA 313 (Feb. 25, 1986)
91 IBLA 378 (Apr. 28, 1986)
93 IBLA 1, 93 I.D. 288 (1986)
93 IBLA 199 (Aug. 18, 1986)
94 IBLA 229 (Nov. 10, 1986)
94 IBLA 239 (Nov. 12, 1986)
95 IBLA 26 (Dec. 12, 1986)
28-1 ——— 94 IBLA 239 (Nov. 12, 1986)
28b ——— 91 IBLA 378 (Apr. 28, 1986)
29 ——— 90 IBLA 313 (Feb. 25, 1986)
94 IBLA 69 (Sept. 29, 1986)
94 IBLA 229 (Nov. 10, 1986)
95 IBLA 44 (Dec. 19, 1986)
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30 ——— M-36955, 93 I.D. 369 (1986)
35 ——— 92 IBLA 109, 93 I.D. 211 (1986)
94 IBLA 69 (Sept. 29, 1986)
95 IBLA 33 (Dec. 15, 1986)
36 ——— 92 IBLA 109, 93 I.D. 211 (1986)
38 ——— 90 IBLA 249 (Jan. 30, 1986)
92 IBLA 87 (May 28, 1986)
94 IBLA 121 (Oct. 9, 1986)
95 IBLA 44 (Dec. 19, 1986)
42 ——— 93 IBLA 1, 93 I.D. 288 (1986)
42(a) ——— 93 IBLA 1, 93 I.D. 288 (1986)
42(b) ——— 93 IBLA 289 (Sept. 4, 1986)
51 ——— 93 IBLA 1, 93 I.D. 288 (1986)
53 ——— M-36955, 93 I.D. 369 (1986)
121 ——— 90 IBLA 293, 93 I.D. 66 (1986)
123 ——— 90 IBLA 293, 93 I.D. 66 (1986)
90 IBLA 310 (Feb. 26, 1986)
161 ——— 92 IBLA 109, 93 I.D. 211 (1986)
95 IBLA 69 (Dec. 22, 1986)
181 ——— 90 IBLA 293, 93 I.D. 66 (1986)
90 IBLA 388 (Feb. 28, 1986)
92 IBLA 18 (May 6, 1986)
92 IBLA 353 (June 30, 1986)
94 IBLA 69 (Sept. 29, 1986)
181 et seq. - 91 IBLA 278, 93 I.D. 179 (1986)
95 IBLA 69 (Dec. 2, 1986)
183 ——— 93 IBLA 283 (Aug. 29, 1986)
184(g) ——— 92 IBLA 235, 93 I.D. 258 (1986)
184(h)(1) — 92 IBLA 235, 93 I.D. 258 (1986)
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93 IBLA 351 (Sept. 15, 1986)
185 ——— 93 IBLA 293 (Sept. 4, 1986)
185(1) ——— 93 IBLA 293 (Sept. 4, 1986)
187 ——— 94 IBLA 254 (Nov. 13, 1986)
94 IBLA 352 (Dec. 1, 1986)
187a ——— 90 IBLA 280 (Feb. 10, 1986)
90 IBLA 165 (Mar. 26, 1986)

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93 IBLA 143 (July 30, 1986)
94 IBLA 84 (Sept. 30, 1986)
94 IBLA 197 (Oct. 30, 1986)
94 IBLA 254 (Nov. 13, 1986)
188 ——— 91 IBLA 327 (Apr. 17, 1986)
93 IBLA 97 (July 22, 1986)
94 IBLA 259 (Nov. 14, 1986)
188(a) ——— 93 IBLA 283 (Aug. 29, 1986)
188(b) ——— 90 IBLA 182 (Jan. 23, 1986)
90 IBLA 280 (Feb. 10, 1986)
90 IBLA 349 (Feb. 26, 1986)
90 IBLA 357 (Feb. 27, 1986)
91 IBLA 165 (Mar. 26, 1986)
91 IBLA 187 (Mar. 31, 1986)
91 IBLA 239 (Apr. 8, 1986)
91 IBLA 327 (Apr. 17, 1986)
91 IBLA 394 (Apr. 29, 1986)
92 IBLA 98 (May 28, 1986)
92 IBLA 101 (May 30, 1986)
92 IBLA 308 (June 26, 1986)
92 IBLA 330 (June 30, 1986)
92 IBLA 378 (July 8, 1986)
93 IBLA 80 (July 16, 1986)
93 IBLA 97 (July 22, 1986)
94 IBLA 30 (Sept. 25, 1986)
94 IBLA 148 (Oct. 21, 1986)
94 IBLA 150 (Oct. 23, 1986)
94 IBLA 197 (Oct. 30, 1986)
94 IBLA 254 (Nov. 13, 1986)
94 IBLA 259 (Nov. 14, 1986)
94 IBLA 344 (Nov. 26, 1986)
188(c) ——— 90 IBLA 182 (Jan. 23, 1986)
90 IBLA 280 (Feb. 10, 1986)
90 IBLA 349 (Feb. 26, 1986)
90 IBLA 357 (Feb. 27, 1986)
91 IBLA 165 (Mar. 26, 1986)
91 IBLA 187 (Mar. 31, 1986)
91 IBLA 239 (Apr. 8, 1986)
91 IBLA 327 (Apr. 17, 1986)
91 IBLA 394 (Apr. 29, 1986)
92 IBLA 101 (May 30, 1986)
92 IBLA 308 (June 26, 1986)
92 IBLA 330 (June 30, 1986)
92 IBLA 378 (July 8, 1986)
93 IBLA 80 (July 16, 1986)
93 IBLA 97 (July 22, 1986)
94 IBLA 30 (Sept. 25, 1986)
94 IBLA 148 (Oct. 21, 1986)
94 IBLA 150 (Oct. 23, 1986)
94 IBLA 197 (Oct. 30, 1986)
94 IBLA 254 (Nov. 13, 1986)
94 IBLA 344 (Nov. 26, 1986)
188(d) ——— 90 IBLA 182 (Jan. 23, 1986)
90 IBLA 280 (Feb. 10, 1986)
90 IBLA 349 (Feb. 26, 1986)
90 IBLA 357 (Feb. 27, 1986)
91 IBLA 187 (Mar. 31, 1986)
91 IBLA 239 (Apr. 8, 1986)
91 IBLA 327 (Apr. 17, 1986)
91 IBLA 394 (Apr. 29, 1986)
92 IBLA 330 (June 20, 1986)
92 IBLA 308 (June 26, 1986)
92 IBLA 378 (July 8, 1986)
93 IBLA 80 (July 16, 1986)
93 IBLA 97 (July 22, 1986)
94 IBLA 150 (Oct. 23, 1986)
94 IBLA 197 (Oct. 30, 1986)

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94 IBLA 344 (Nov. 26, 1986)
188(d)
(2)(B) ——— 90 IBLA 349 (Feb. 26, 1986)
91 IBLA 395 (Apr. 29, 1986)
92 IBLA 330 (June 30, 1986)
188(e) ——— 90 IBLA 182 (Jan. 23, 1986)
90 IBLA 349 (Feb. 26, 1986)
90 IBLA 357 (Feb. 27, 1986)
91 IBLA 187 (Mar. 31, 1986)
91 IBLA 394 (Apr. 29, 1986)
92 IBLA 330 (June 30, 1986)
94 IBLA 197 (Oct. 30, 1986)
94 IBLA 254 (Nov. 13, 1986)
94 IBLA 344 (Nov. 26, 1986)
188(e)(2) ——— 90 IBLA 349 (Feb. 26, 1986)
92 IBLA 330 (June 20, 1986)
189 ——— 92 IBLA 235, 93 I.D. 258 (1986)
93 IBLA 283 (Aug. 29, 1986)
191 ——— 92 IBLA 365, 93 I.D. 285 (1986)
93 IBLA 317, 93 I.D. 394 (1986)
94 IBLA 78 (Sept. 30, 1986)
94 IBLA 215 (Nov. 5, 1986)
192(c) ——— 91 IBLA 55 (Feb. 28, 1986)
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93 IBLA 272 (Aug. 29, 1986)
93 IBLA 317, 93 I.D. 394 (1986)
201-209 ——— 91 IBLA 93 (Mar. 13, 1986)
92 IBLA 184, 93 I.D. 239 (1986)
93 IBLA 179 (Aug. 15, 1986)
93 IBLA 272 (Aug. 29, 1986)
94 IBLA 352 (Dec. 1, 1986)
201(a)(1) ——— 93 IBLA 317, 93 I.D. 394 (1986)
202a(2) ——— 94 IBLA 269, 93 I.D. 417 (1986)
207 ——— 91 IBLA 93 (Mar. 13, 1986)
92 IBLA 184, 93 I.D. 239 (1986)
93 IBLA 317, 93 I.D. 394 (1986)
94 IBLA 333 (Nov. 25, 1986)
94 IBLA 352 (Dec. 1, 1986)
95 IBLA 16 (Dec. 12, 1986)
207(a) ——— 91 IBLA 93 (Mar. 13, 1986)
92 IBLA 184, 93 I.D. 239 (1986)
93 IBLA 179 (Aug. 15, 1986)
93 IBLA 272 (Aug. 29, 1986)
93 IBLA 317, 93 I.D. 394 (1986)
94 IBLA 333 (Nov. 25, 1986)
94 IBLA 352 (Dec. 1, 1986)
207(b) ——— 92 IBLA 184, 93 I.D. 239 (1986)
93 IBLA 317, 93 I.D. 394 (1986)
207(c) ——— 94 IBLA 269, 93 I.D. 417 (1986)
208 ——— 90 IBLA 338 (Feb. 26, 1986)
209 ——— 91 IBLA 93 (Mar. 13, 1986)
92 IBLA 46 (May 9, 1986)
92 IBLA 333 (June 30, 1986)
92 IBLA 184, 93 I.D. 239 (1986)
93 IBLA 179 (Aug. 15, 1986)
93 IBLA 272 (Aug. 29, 1986)
93 IBLA 317, 93 I.D. 394 (1986)
94 IBLA 115 (Oct. 9, 1986)
94 IBLA 333 (Nov. 25, 1986)
95 IBLA 16 (Dec. 12, 1986)
226 ——— 90 IBLA 349(Feb. 26, 1986)
90 IBLA 357 (Feb. 27, 1986)
91 IBLA 187 (Mar. 31, 1986)
92 IBLA 12 (May 6, 1986)
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92 IBLA 235, 93 I.D. 258 (1986)
92 IBLA 330 (June 30, 1986)

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224	92 IBLA 353 (June 30, 1986)
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	93 IBLA 101 (July 22, 1986)
	93 IBLA 143 (July 30, 1986)
	94 IBLA 64 (Sept. 29, 1986)
	94 IBLA 212 (Nov. 5, 1986)
	94 IBLA 254 (Nov. 13, 1986)
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226(b)	90 IBLA 375 (Feb. 27, 1986)
	90 IBLA 378 (Feb. 27, 1986)
	91 IBLA 76 (Mar. 3, 1986)
	91 IBLA 119 (Mar. 17, 1986)
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	93 IBLA 343 (Sept. 11, 1986)
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	94 IBLA 34 (Sept. 25, 1986)
	94 IBLA 135 (Oct. 21, 1986)
	94 IBLA 202 (Nov. 4, 1986)
	94 IBLA 249 (Nov. 13, 1986)
226(c)	91 IBLA 268 (Apr. 11, 1986)
	92 IBLA 235, 93 I.D. 258 (1986)
	93 IBLA 97 (July 22, 1986)
	93 IBLA 138 (July 30, 1986)
	93 IBLA 314 (Sept. 11, 1986)
	93 IBLA 351 (Sept. 15, 1986)
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226(e)	93 IBLA 143 (July 30, 1986)
226(j)	90 IBLA 388 (Feb. 28, 1986)
	92 IBLA 12 (May 6, 1986)
	92 IBLA 46 (May 9, 1986)
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	93 IBLA 131 (July 29, 1986)
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226-2	93 IBLA 124 (July 29, 1986)
261	93 IBLA 283 (Aug. 29, 1986)
262	95 IBLA 69 (Dec. 22, 1986)
351	91 IBLA 86 (Mar. 11, 1986)
351-359	91 IBLA 143 (Mar. 24, 1986)
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351 et seq.	90 IBLA 280 (Feb. 10, 1986)
	95 IBLA 69 (Dec. 22, 1986)
352	91 IBLA 143 (Mar. 24, 1986)
	91 IBLA 384 (Apr. 28, 1986)
	92 IBLA 18 (May 6, 1986)
	93 IBLA 179 (Aug. 15, 1986)
	93 IBLA 314 (Sept. 11, 1986)
	94 IBLA 30 (Sept. 25, 1986)
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601-615	92 IBLA 58 (May 13, 1986)
611	90 IBLA 255 (Jan. 31, 1986)
	92 IBLA 58 (May 13, 1986)
	92 IBLA 109, 93 I.D. 211 (1986)
	93 IBLA 1, 93 I.D. 288 (1986)
	95 IBLA 55 (Dec. 19, 1986)

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613	92 IBLA 58 (May 13, 1986)
613(b)	92 IBLA 58 (May 13, 1986)
621	94 IBLA 374 (Dec. 4, 1986)
621-625	94 IBLA 374 (Dec. 4, 1986)
621(a)	93 IBLA 346 (Sept. 11, 1986)
	94 IBLA 374 (Dec. 4, 1986)
701	94 IBLA 162 (Oct. 28, 1986)
1201	92 IBLA 282 (June 25, 1986)
	92 IBLA 381 (July 14, 1986)
	93 IBLA 194 (Aug. 15, 1986)
	94 IBLA 14 (Sept. 19, 1986)
1202(a)	93 IBLA 225 (Aug. 22, 1986)
1232	95 IBLA 1, 93 I.D. 460 (1986)
1232(a)	95 IBLA 1, 93 I.D. 460 (1986)
1232(b)	95 IBLA 1, 93 I.D. 460 (1986)
1232(e)	95 IBLA 1, 93 I.D. 460 (1986)
1251	93 IBLA 225 (Aug. 22, 1986)
1252	93 IBLA 386 (Sept. 17, 1986)
	94 IBLA 14 (Sept. 19, 1986)
1252(a)	93 IBLA 386 (Sept. 17, 1986)
	94 IBLA 269, 93 I.D. 417 (1986)
1253	93 IBLA 386 (Sept. 17, 1986)
1254(b)	92 IBLA 320 (June 26, 1986)
1256(a)	93 IBLA 386 (Sept. 17, 1986)
	94 IBLA 14 (Sept. 19, 1986)
1258	94 IBLA 269, 93 I.D. 417 (1986)
1258(a)	94 IBLA 269, 93 I.D. 417 (1986)
1258(a)(13)	94 IBLA 269, 93 I.D. 417 (1986)
1260(a)	91 IBLA 59 (Feb. 28, 1986)
1260(b)	94 IBLA 269, 93 I.D. 417 (1986)
1260(b)(3)	94 IBLA 269, 93 I.D. 417 (1986)
1260(d)(1)	93 IBLA 225 (Aug. 22, 1986)
1264	94 IBLA 269, 93 I.D. 417 (1986)
1264(b)	94 IBLA 269, 93 I.D. 417 (1986)
1264(c)	91 IBLA 59 (Feb. 28, 1986)
	94 IBLA 269, 93 I.D. 417 (1986)
1264(f)	94 IBLA 269, 93 I.D. 417 (1986)
1265(b)(3)	94 IBLA 183 (Oct. 30, 1986)
1265(d)(2)	94 IBLA 183 (Oct. 30, 1986)
1265(e)	94 IBLA 183 (Oct. 30, 1986)
1268	90 IBLA 186, 93 I.D. 1 (1986)
1268(a)	90 IBLA 186, 93 I.D. 1 (1986)
1268(c)	92 IBLA 371 (July 1, 1986)
1268(h)	90 IBLA 186, 93 I.D. 1 (1986)
1269(c)(2)	93 IBLA 225 (Aug. 22, 1986)
1271(a)	92 IBLA 4 (Apr. 30, 1986)
	92 IBLA 23, 93 I.D. 199 (1986)
	92 IBLA 320 (June 26, 1986)
	93 IBLA 225 (Aug. 22, 1986)
1271(a)(1)	93 IBLA 225 (Aug. 22, 1986)
	93 IBLA 386 (Sept. 17, 1986)
1271(a)(5)	93 IBLA 386 (Sept. 17, 1986)
	94 IBLA 183 (Oct. 30, 1986)
1271(b)	92 IBLA 320 (June 26, 1986)
	92 IBLA 381 (July 14, 1986)
	93 IBLA 194 (Aug. 15, 1986)
	93 IBLA 386 (Sept. 17, 1986)
1273(c)	92 IBLA 4 (Apr. 30, 1986)
	94 IBLA 269, 93 I.D. 417 (1986)
1275	92 IBLA 23, 93 I.D. 199 (1986)
	93 IBLA 386 (Sept. 17, 1986)
	94 IBLA 183 (Oct. 30, 1986)
1275(b)	94 IBLA 183 (Oct. 30, 1986)
1275(c)	92 IBLA 4 (Apr. 30, 1986)
1275(e)	94 IBLA 269, 93 I.D. 417 (1986)
1276	94 IBLA 269, 93 I.D. 417 (1986)
1276(a)(1)	92 IBLA 381 (July 14, 1986)
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1291 ———— 95 IBLA 1, 93 I.D. 460 (1986)
1291(2) ——— 94 IBLA 183 (Oct. 30, 1986)
1291(13) ——— 95 IBLA 1, 93 I.D. 460 (1986)
1291(28) ——— 95 IBLA 1, 93 I.D. 460 (1986)
1304 ———— 93 IBLA 221 (Aug. 20, 1986)
1701 ———— 93 IBLA 267 (Aug. 29, 1986)
1701(a) ——— 93 IBLA 267 (Aug. 29, 1986)
1701(b)(3) —— 90 IBLA 236, 93 I.D. 6 (1986)
1709 ———— 91 IBLA 252 (Apr. 9, 1986)
1721 ———— 90 IBLA 236, 93 I.D. 6 (1986)

TITLE 31:

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3716 ———— 95 IBLA 1, 93 I.D. 460 (1986)
3716(a) ——— 95 IBLA 1, 93 I.D. 460 (1986)
3716(b) ——— 95 IBLA 1, 93 I.D. 460 (1986)

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601-613 ——— IBCA-1839, 93 I.D. 131 (1986)
IBCA-2078-F, 93 I.D. 437 (1986)
602 ———— IBCA-1962 & 1966, 93 I.D. 136 (1986)
605 ———— IBCA-1839, 93 I.D. 131 (1986)
605(c) ——— IBCA-2090, 93 I.D. 250 (1986)
605(c)(1) —— IBCA-1566-3-82, 93 I.D. 144 (1986)
IBCA-1839, 93 I.D. 131 (1986)
606 ———— IBCA-2068, 93 I.D. 254 (1986)
608 ———— IBCA-2065 (Jan. 10, 1986)
611 ———— IBCA-1839, 93 I.D. 131 (1986)

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91 IBLA 172 (Mar. 28, 1986)
4321 ———— 90 IBLA 221 (Jan. 30, 1986)
4321-4347 —— 91 IBLA 172 (Mar. 28, 1986)
4321 et seq. - 90 IBLA 360 (Feb. 27, 1986)
94 IBLA 269, 93 I.D. 417 (1986)
4332 ———— 91 IBLA 124 (Mar. 19, 1986)
4332(2)(C) —— 91 IBLA 59 (Feb. 28, 1986)
92 IBLA 290 (June 26, 1986)
4332(2)(E) —— 91 IBLA 364 (Apr. 24, 1986)
4601 et seq. - 6 OHA 127 (Feb. 11, 1986)
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4601(6) ——— 6 OHA 128 (Mar. 24, 1986)
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6 OHA 228 (Aug. 28, 1986)
7 OHA 28 (Nov. 18, 1986)
7 OHA 34 (Dec. 17, 1986)
4602(a) ——— 6 OHA 228 (Aug. 28, 1986)
4622 ———— 6 OHA 124 (Jan. 9, 1986)
6 OHA 128 (Mar. 24, 1986)
6 OHA 228 (Aug. 28, 1986)
7 OHA 28 (Nov. 18, 1986)
7 OHA 34 (Dec. 17, 1986)
4622(a) ——— 6 OHA 228 (Aug. 28, 1986)
7 OHA 34 (Dec. 17, 1986)
4622(c) ——— 6 OHA 215 (Aug. 11, 1986)

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4633 ———— 6 OHA 228 (Aug. 28, 1986)
7 OHA 32 (Dec. 3, 1986)
4651 ———— 6 OHA 228 (Aug. 28, 1986)
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141 ———— 93 IBLA 346 (Sept. 11, 1986)
154 ———— 91 IBLA 391 (Apr. 29, 1986)
94 IBLA 1 (Sept. 18, 1986)
155-158 ——— 95 IBLA 52 (Dec. 19, 1986)
156 ———— 95 IBLA 52 (Dec. 19, 1986)
158 ———— 92 IBLA 353 (June 30, 1986)
162(j)(1) —— 94 IBLA 107 (Oct. 7, 1986)
207 ———— 93 IBLA 179 (Aug. 15, 1986)
270-1 ———— 90 IBLA 168 (Jan. 8, 1986)
90 IBLA 265 (Jan. 31, 1986)
90 IBLA 273 (Feb. 5, 1986)
90 IBLA 330 (Feb. 26, 1986)
92 IBLA 174 (June 11, 1986)
270-1-270-3 - 90 IBLA 273 (Feb. 5, 1986)
90 IBLA 330 (Feb. 26, 1986)
91 IBLA 343 (Apr. 21, 1986)
92 IBLA 174 (June 11, 1986)
92 IBLA 340 (June 30, 1986)
94 IBLA 38 (Sept. 25, 1986)
270-2 ———— 93 IBLA 147 (July 30, 1986)
93 IBLA 355 (Sept. 15, 1986)
270-3 ———— 90 IBLA 265 (Jan. 31, 1986)
90 IBLA 273 (Feb. 5, 1986)
90 IBLA 330 (Feb. 26, 1986)
92 IBLA 174 (June 11, 1986)
94 IBLA 38 (Sept. 25, 1986)
291 ———— 91 IBLA 278, 93 I.D. 179 (1986)
299 ———— 90 IBLA 293, 93 I.D. 66 (1986)
91 IBLA 278, 93 I.D. 179 (1986)
94 IBLA 69 (Sept. 29, 1986)
315 ———— 92 IBLA 109, 93 I.D. 211 (1986)
92 IBLA 200 (June 12, 1986)
315a ———— 92 IBLA 200 (June 12, 1986)
315a-315r —— 92 IBLA 200 (June 12, 1986)
315c ———— 92 IBLA 200 (June 12, 1986)
315g ———— 90 IBLA 372 (Feb. 27, 1986)
94 IBLA 1 (Sept. 18, 1986)
315h ———— 93 IBLA 89 (July 22, 1986)
315m ———— 92 IBLA 200 (June 12, 1986)
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321 ———— 95 IBLA 37 (Dec. 15, 1986)
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1621(j)(1)	91 IBLA 305 (Apr. 15, 1986)
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93 IBLA 293 (Sept. 4, 1986)
94 IBLA 261 (Nov. 17, 1986)
1761(a) — 91 IBLA 172 (Mar. 28, 1986)
94 IBLA 138 (Oct. 21, 1986)
94 IBLA 167 (Oct. 28, 1986)
1761(a)(5) — 91 IBLA 399 (Apr. 30, 1986)
93 IBLA 310 (Sept. 11, 1986)
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92 IBLA 87 (May 28, 1986)
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93 IBLA 267 (Aug. 29, 1986)
94 IBLA 212 (Nov. 5, 1986)
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92 IBLA 87 (May 28, 1986)
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TITLE 49:

sec. 11503 — 14 IBIA 46, 93 I.D. 79 (1986)

GENERALLY

The Mineral Leasing Act, As amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 218.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. In order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 215 (Nov. 5, 1986)

DISTRIBUTION OF RECEIPTS

The Mineral Leasing Act, As amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

FEES AND COMMISSIONS

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting

FEES AND COMMISSIONS--Continued

operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 99 (Dec. 29, 1986)

PAYMENTS

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary not in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

REFUNDS

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Buchsbahl, 91 IBLA 384 (Apr. 28, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, B. B. Allsup, 92 IBLA 197 (June 12, 1986)

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required * * * by applicable law" under 43 U.S.C. § 1736(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986)
93 I.D. 285

ACQUIRED LANDS

Lands which were acquired under the Bents Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 27 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 475, 478 (1982).

Colorin Pressure, R. Diane Quinby, 97 IBLA 20 (May 6, 1987)

ACT OF AUGUST 18, 1894

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, so far as then possible, toward the acquisition of such a right.

Hazlee S. Dobson, Cynthia S. Dobson, 95 IBLA 37 (Dec. 17, 1986)

ACT OF JULY 17, 1914

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, 43 Amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lasher et al., 96 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

ACT OF FEBRUARY 25, 1920

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

ACT OF AUGUST 1, 1956

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

ADMINISTRATIVE AUTHORITY

GENERALLY

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Plexalgae Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 180 (June 30, 1986)

Neither 43 U.S.C. § 1748 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 88 (Dec. 19, 1986)

ESTOPPEL

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Ar...ne M. Miller, 91 IBLA 205 (Apr. 8, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept

ADMINISTRATIVE AUTHORITY--Continued

WITHDRAW--Continued

an erroneous erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 91 IBLA 317 (Sept. 11, 1986)
93 I.D. 190

ADMINISTRATIVE PRACTICE

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

E. E. Villion, 90 IBLA 378 (Feb. 27, 1986)

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Tisher River Rafting, Inc., 93 IBLA 90 (Dec. 29, 1986)

ADMINISTRATIVE PROCEDURE

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 218.50 provide for placement of those royalty payments payable to a State which are under challenge in a suspense account pending resolution of the dispute. Where the District Court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the District Court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 218.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeFaivre, 93 IBLA 26 (Dec. 12, 1986)

ADJUDICATION

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

ADJUDICATION--Continued

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Peters v. Kleppe, 539 F.2d 1351 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Agnes Kava Evans, 91 IBLA 369 (Sept. 23, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean R. Anderson, 94 IBLA 88 (Sept. 30, 1986)

ADMINISTRATIVE PROCEDURE ACT

A decision of this Board is an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. § 554 (1982).

Dorian C. Davis, 93 IBLA 211 (Aug. 20, 1986)

ADMINISTRATIVE REVIEW

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Burgess Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)
93 I.D. 13

ADMINISTRATIVE REVIEW--Continued

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion

Frank D. Simpson & Nancy L. Simpson v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley H. Strong & Nina Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 2, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean R. Anderson, 94 IBLA 88 (Sept. 30, 1986)

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986)
93 I.D. 409

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Add-Ventures, Ltd., 95 IBLA 98 (Dec 19, 1986)

BURDEN OF PROOF

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by

clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John S. Carter, Sr., Verna B. Carter, 98 IBLA 206 (Feb. 19, 1987)

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

When a party appeals a BIA assessment determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Nenana Cha-Ag Native Corp., Troxell Hebert, 93 IBLA 258 (Aug. 26, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Strehe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 111 (May 21, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the

authenticity of the relinquishment document is verified.

Matilda Titus, 93 IBLA 369 (June 30, 1986)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher Oil Fisher, Fisher International, Inc., 93 IBLA 68 (July 15, 1986)

Where BIA never adjudicated a timely protest to the filing of a notice of plat of survey, and the protest disputes the conclusion that a tract of land was an unsurveyed island at the time of the original survey, the protest may be referred for a hearing.

Jerome L. Halstad, 93 IBLA 119 (July 29, 1986)

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a rental adjustment was based on substantial evidence, the matter will be referred for an evidentiary hearing and recommended decision.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 7 (Oct. 8, 1986)

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Pamela T. Simons, 95 IBLA 69 (Dec. 22, 1986)

PUBLISHING

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't. Secretary--Indian Affairs (Operations), 14 IBIA 7 (Jan. 31, 1986); 93 I.D. 13

STANDING

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Bouquet, 90 IBLA 168 (Jan. 8, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

SUBSTANTIAL EVIDENCE

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Omar S. Anderson, 94 IBLA 88 (Sept. 30, 1986)

ALASKA

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice F. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

GRAZING

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 91 IBLA 109 (July 24, 1986)

LAND GRANTS AND SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlie J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon F. Griffin, 92 IBLA 87 (May 28, 1986)

NATIVE ALLOTMENTS

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment

Gladys Bouquet, 90 IBLA 168 (Jan. 8, 1986)

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the

applicant can establish that his relinquishment was involuntary and unknowing.

Peter Jones, 91 IBLA 385 (Apr. 15, 1986)

Where an application to acquire federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Secretarial Order No. 1949 of May 25, 1979, requires the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Agnes Mayo Sparr, 91 IBLA 393 (Apr. 21, 1986)

A Native allotment application filed pursuant to sec. 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), is properly denied where the applicant fails to establish her independent use and occupancy as a minor child prior to withdrawal of the claimed land.

United States v. Annie Bennett, 92 IBLA 170 (June 11, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as unrebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant.

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 355 (Sept. 15, 1986)

NATIVE ALLOTMENTS--Continued

The Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1982), authorized the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo who resided in and was a native of Alaska. No allotment shall be made to any person until said person has made proof satisfactory to the Secretary of substantially continuous use and occupancy of the land for a period of 5 years.

Segregation of lands from appropriation under the Native Allotment Act by a proposed multiple-use management classification does not bar completion of the required 5-years' use and occupancy where such use and occupancy has commenced prior to the segregation.

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

The standard of proof requirement to be applied in Native allotment cases is the preponderance of evidence standard, rather than the previously utilized standard of clear and credible evidence.

To qualify for an allotment under the Native Allotment Act and regulations, a Native must show substantial actual possession and use of the claimed land at least potentially exclusive of others and not merely intermittent use. Where the established use consists of approximately two trips per year to an area principally for hunting for a total of a few days to a week per trip, such use is properly characterized as intermittent.

United States v. Estate of George D. Estabrook, John J. Estabrook, Leland P. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

POSSESSORY RIGHTS

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

STATEHOOD ACT

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

STATEHOOD ACT--Continued

Under 43 CFR 2091.6-6 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlie J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

TOWNSITES

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Elwood, 98 IBLA 107 (Oct. 7, 1986)

The occupants of townsite lots at the time of approval of subdivisional survey are entitled to deeds to those lots from the townsite trustee pursuant to the regulation at 43 CFR 2565.3(c). An application for deed filed on behalf of a party not in occupancy at the time of subdivisional survey is properly rejected by the trustee.

Bristol Bay Housing Authority, 95 IBLA 20 (Dec. 12, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Elizabeth S. Bjelland et al., 93 IBLA 203 (Aug. 29, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(e)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

A dirt airstrip is an improvement within the meaning of sec. 905(a)(5)(C) of ANILCA.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

NATIVE RESERVES

Boundaries

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowing

Peter John, 91 IBLA 305 (Apr. 15, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jennie A. Massy, Harold F. McNally, 92 IBLA 228 (June 24, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

ADMINISTRATIVE PROCEDURE

Decision to Issue Conveyance

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

APPEALS

Generally

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Bendas Cha-ag Native Corp. v. Troxell Mehrt, 93 IBLA 250 (Aug. 26, 1986)

APPEALS--Continued

Generally--Continued

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1837 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tatilla Native Corp., 93 IBLA 389 (Sept. 17, 1986)

Standing

In order to establish standing to appeal a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 19(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(b)(2) (1982), an appellant need not assert a property interest in land selected by the Native group, but need only assert that he is adversely affected by the eligibility determination by virtue of his use of the selected land.

Winchester Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

CONVEYANCES

Cemetery Sites and Historical Places

Applications by regional corporations for fee title to historical places pursuant to 43 U.S.C. § 1613(h)(1) (1982) segregate the land from appropriation under the public land laws, including the mining and mineral leasing laws.

N.O.I. Associates, 93 IBLA 317 (June 24, 1986)

Applications by regional corporations for fee title to historical places pursuant to 43 U.S.C. § 1613(h)(1) (1982) segregate the land from appropriation under the public land laws, including the mining and mineral leasing laws. Mining claims subsequently located on segregated land are properly declared null and void ab initio.

Donald D. Hall et al., 93 IBLA 33 (Dec. 19, 1986)

Easements

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Tanadgusix Corp., Troxell Hebert, 93 IBLA 250 (Aug. 29, 1986)

Interim Conveyance

Where an interim conveyance to a Native village corporation under sec. 22(i) of ANCSA, 43 U.S.C. § 1621(i) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(i) of ANCSA, if the

CONVEYANCES--Continued

Interim Conveyance--Continued

applicant can establish that his relinquishment was involuntary and unknowing.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

Native Groups

In order to establish standing to appeal a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 19(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(b)(2) (1982), an appellant need not assert a property interest in land selected by the Native group, but need only assert that he is adversely affected by the eligibility determination by virtue of his use of the selected land.

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 19(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(b)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Winchester Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because members of the group did not constitute a majority of the residents of the locality on Apr. 1, 1970, will be affirmed where after a hearing is held the facts of record show that there were 30 residents of the locality on Apr. 1, 1970, of which only 15 were group members, and, therefore, the group failed to qualify as the majority of the residents of the locality as required by 43 CFR 2653.6(a)(3).

Chugach Alaska Corp., The Groups Creek Corp., 94 IBLA 29 (Sept. 25, 1986)

Valid Existing Rights

Generally

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 93 IBLA 380 (June 30, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS

Public Lands

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

The smallest practicable tract of land occupied and actually used by the Bureau of Indian Affairs as a school during the period of time it was available for selection by a Native village corporation does not come within the definition of "public lands" under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), and thus is not available for Native village selection even though the Bureau entered into an agreement during the selection period to transfer use of the land to a State agency.

Olgoonik Corp., IBLA, 93 IBLA 80 (Dec. 29, 1986)

EASEMENTS

Generally

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Kenaitze Cha-ag Native Corp., Trosell Robert, 93 IBLA 250 (Aug. 28, 1986)

NATIVE LAND SELECTIONS

Native Reserves

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

Regional Selections

Generally

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Regional Selections--Continued

Generally--Continued

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1611 (1982) of that Act, a BIA decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice F. DeBoer, 93 IBLA 217 (Apr. 15, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1611 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

Selection Limitations

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

NATIVE LAND SELECTIONS--Continued

Village Selections

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

Sitnasuak Native Corp., 91 IBLA 85 (Mar. 11, 1986)

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Tuluksiut Native Corp., 93 IBLA 190 (Aug. 15, 1986)

The smallest practicable tract of land occupied and actually used by the Bureau of Indian Affairs as a school during the period of time it was available for selection by a Native village corporation does not come within the definition of "public lands" under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), and thus is not available for Native village selection even though the Bureau entered into an agreement during the selection period to transfer use of the land to a State agency.

Qinqnqik Corp., Inc., 93 IBLA 80 (Dec. 29, 1986)

PRIMARY PLACE OF RESIDENCE

Criteria

In order to establish a primary place of residence there must be evidence that the applicant resided on the tract applied for as a primary place of residence on a regular or seasonal basis for a substantial period of time.

Where a Native has resided in a dwelling for a 3-1/2 week period (including the critical date, Aug. 31, 1971) on land subsequently applied for as a primary place of residence, such occupancy does not meet the regulatory requirements for conveyance because it is neither regular nor seasonal, nor for a substantial period of time.

Rose Perley Miller, 93 IBLA 147 (July 30, 1986)

WITHDRAWALS AND RESERVATIONS

Withdrawals for Native Selection

Generally

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Tuluksiut Native Corp., 93 IBLA 190 (Aug. 15, 1986)

APPEALS

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Roquist, 90 IBLA 168 (Jan. 8, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Ekluthna, Inc., 90 IBLA 196 (Jan. 30, 1986)

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Agnes Mayo Moore, 91 IBLA 383 (Apr. 21, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 276 (June 24, 1986)

Andre C. Capella, 90 IBLA 181 (Oct. 29, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

B. L. & Norma Jean Newman et al., 92 IBLA 314 (June 26, 1986)

An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986) 93 I.D. 285

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to adjoining landowners who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 93 IBLA 155 (July 31, 1986)

An appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an order of this Board requiring a showing of cause why the appeal should not be dismissed.

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within

the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances.

Nondalton Chevak Native Corp., Ingwell Robert, 93 IBLA 259 (Aug. 28, 1986)

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Allphin, 93 IBLA 285 (Aug. 28, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986) 93 I.D. 394

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1601 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Don G. Carpenter, 90 IBLA 7 (Sept. 18, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

TCG May 1982, 90 IBLA 22 (Sept. 23, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean M. Anderson, 90 IBLA 88 (Sept. 30, 1986)

APPEALS--Continued

The failure to file a timely appeal from a decision approving an interim conveyance of land to a Native corporation precludes a later appeal as to that land. Such an appeal must be dismissed.

City of Flaxyck, 96 IBLA 187 (Oct. 7, 1986)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 96 IBLA 347 (Nov. 28, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LaPalme, 95 IBLA 26 (Dec. 12, 1986)

APPLICATIONS AND ENTRIES

GENERALLY

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested administrative costs as required by 43 CFR 2720.1-1(b)(1), the application is properly rejected.

Wilma M. Thim Corp., 93 IBLA 128 (July 29, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right

Marlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

APPLICATIONS AND ENTRIES--Continued

RELINQUISHMENT

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 280 (June 30, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as unrebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 155 (Sept. 15, 1986)

APPRAISALS

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 8, 1986)

APPRAISALS--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jarchow, IBLA, 93 IBLA 318 (Sept. 11, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 19, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may generally be rebutted only by another appraisal.

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

ATTORNEY'S FEES

CONTRACT DISPUTES ACT OF 1978

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious

ATTORNEY'S FEES--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

new claims in its answers to the Government's interrogatories just prior to the hearing.

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986) 93 I.D. 437

EQUAL ACCESS TO JUSTICE ACT

Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986) 93 I.D. 437

Prevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986) 93 I.D. 437

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986) 93 I.D. 437

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's

post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, is a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-P (Nov 24, 1986)
93 I.D. 437

BOARD OF INDIAN APPEALS

GENERALLY

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 78 (Oct. 30, 1986) 93 I.D. 409

JURISDICTION

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Alta Vare Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

David Sohappy, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 109 (Apr. 8, 1986)
93 I.D. 176

When the official exercising the administrative review functions of the Commissioner of Indian Affairs fails to issue a decision within 30 days from the date an appeal was ripe for decision, the Board of Indian Appeals acquires jurisdiction under the terms of 25 CFR 2.19(b) without regard to whether the decision under review is based upon an exercise of discretion or an interpretation of law.

Quinault Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 2, 1986)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It does not have the authority to award money damages against the Bureau of Indian Affairs.

Charles Stephens v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 154 (July 10, 1986)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA or against an Indian tribe

Vance Gillette v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 14 IBIA 187 (July 25, 1986)

An appeal from a decision of a Bureau of Indian Affairs Area Director or the Deputy Assistant Secretary--Indian Affairs (Operations) may properly be before the Board of Indian Appeals even though a related matter has been decided by the Assistant Secretary for Indian Affairs. However, when the parties before the Board are identically situated to those appearing before the Assistant Secretary, and the issues arise from the same transaction and are precisely the same as those decided by the Assistant Secretary, the precedent established by the Assistant Secretary's decision in the similar case is controlling.

Kiowa Business Committee v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 14 IBIA 196 (Aug. 1, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion

Frank D. Simmons & Nancy I. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 203 (Sept. 2, 1986)

BOARD OF LAND APPEALS

Approval of an activity plan, such as a recreation assessment plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Starsinger Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 398

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1268(c) (1982).

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)
93 I.D. 417

BUREAU OF INDIAN AFFAIRS

GENERALLY

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body

Morgan B. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

The Bureau of Indian Affairs has the right to interpret tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Alta Rose Fossett v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 13 (Oct. 16, 1986)

It is axiomatic that the Bureau of Indian Affairs has a responsibility to interpret Federal regulations in carrying out its duties under those regulations.

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Estate of Mary Dodge Peshlakai, Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 24 (Oct. 28, 1986)
93 I.D. 409

ADMINISTRATIVE APPEALS

Generally

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 7 (Jan. 31, 1986)
93 I.D. 13

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 66 (Feb. 25, 1986)
93 I.D. 79

Except as otherwise specified, the use of Secretarial authority delegated to Bureau of Indian Affairs' agency superintendents is subject to the administrative review procedure set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 75 (Mar. 14, 1986)

Discretionary Decisions

When the official exercising the administrative review functions of the Commissioner of Indian Affairs fails to issue a decision within 30 days from the date an appeal was ripe for decision, the Board of Indian Appeals acquires jurisdiction under the terms of 25 CFR 2.19(b) without regard to whether the decision under review is based upon an exercise of discretion or an interpretation of law.

Under 43 CFR 4.337(b), the Board of Indian Appeals must refer to the Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner of Indian Affairs those issues arising in an appeal before it that are committed to the Commissioner's discretion.

Quileasi Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 7, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion.

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank P. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Stroes & Wilma Stroes v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 7, 1986)

The determination of whether a high bidder is qualified to perform a timber sales contract or whether rejection of a high bid is in the interest of the Indians is a determination requiring the exercise of discretion.

Under 43 CFR 4.337(b), the Board of Indian Appeals must refer to the Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner of Indian Affairs those issues arising in an appeal before it that are committed to the Commissioner's discretion.

Karl Vielle v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 60 (Oct. 30, 1986)

Filing

Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 14, 1986)

Tanana Chiefs' Conference, Inc. v. Area Director, Juneau Area Office, Bureau of Indian Affairs, 14 IBIA 87 (Apr. 4, 1986)

Filing--Continued

Mandatory Time Limit--Continued

An appellant who appeals from an alleged failure of a BIA official to act must appeal within a reasonable time after the appellant should have realized that the BIA official is not going to act. Otherwise his appeal will be considered untimely.

Vance Gillette v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 14 IBIA 187 (July 25, 1986)

BUREAU OF LAND MANAGEMENT

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sonat Oil Co., Inc., 91 IBLA 137 (Mar. 28, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986)

93 I.D. 159

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve, as required by 43 CFR 3162.7-4(b)(1).

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the

authenticity of the relinquishment document is verified.

Phillip Titus, 92 IBLA 349 (June 30, 1986)

The BLM may properly cite an oil and gas lessee for an IMC with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 7262.7-4(b)(1).

Mesa Oil Producers, 93 IBLA 384 (Dec. 8, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 93 IBLA 88 (Dec. 19, 1986)

COAL LEASES AND PERMITS

APPLICATIONS

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

When one files a coal lease application citing the leasing on application regulations in 43 CFR Subpart 3425, but in a subsequent submission declares that he will be using the coal for domestic energy needs, a conflict arises because one seeking coal for such a use must acquire a license to mine in accordance with 43 CFR Subpart 3040.

Randall J. Gerlach, 92 IBLA 338 (Feb. 24, 1986)

DILIGENCE

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Mountain States Resources Corp., 92 IBLA 188 (June 17, 1986) 93 I.D. 239

READJUSTMENT

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 17, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit," as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation for any mine.

Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 15, 1986)

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

LEASES--Continued

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other new terms and conditions on the lease until the end of the next 10-year readjustment period.

Franklin Real Estate Co., 93 IBLA 272 (Aug. 29, 1986)

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 201(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 398

The Board of Land Appeals will not reverse an unreasonable a readjustment of a coal lease to establish a 12-1/2 percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

Spring Creek Coal Co., 94 IBLA 333 (Nov. 25, 1986)

Pacificorp., 95 IBLA 16 (Dec. 12, 1986)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently

LEASES--Continued

provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co., et al., 94 IBLA 352 (Dec. 1, 1986)

READJUSTMENT

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit," as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

given prior to the end of the 20-year primary term of the lease.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation for any mine.

Falcon & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 1st, 1986)

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other new terms and conditions on the lease until the end of the next 10-year readjustment period.

Franklin Real Estate Co., 93 IBLA 272 (Aug. 29, 1986)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co. et al., 94 IBLA 352 (Dec. 1, 1986)

COAL LEASES AND PERMITS--Continued

RENTALS

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

ROYALTIES

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 251(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not

ROYALTIES--Continued

to overrule the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 394

SUSPENSION OF OPERATIONS AND PRODUCTION

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Peabody Coal Co., 93 IBLA 194 (June 19, 1986)
93 I.D. 239

COLOR OR CLAIM OF TITLE

GENERALLY

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

The Department of the Interior cannot grant a color-of-title application for land that was patented and is no longer public land.

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James P. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)

ADVERSE POSSESSION

Good faith and peaceful adverse possession for more than 20 years pursuant to a claim of title is required to establish a class 1 color-of-title claim under 43 U.S.C. § 1068 (1982). There can be no peaceful, adverse possession where applicant's chain of title commences at a time when the land was withdrawn and such a claim is properly rejected.

Arizona Real Estate Exchange, Inc., 93 IBLA 1 (Sept. 18, 1986)

APPLICATIONS

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Pettis, 90 IBLA 323 (Feb. 25, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

Good faith and peaceful adverse possession for more than 20 years pursuant to a claim of title is required to establish a class 1 color-of-title claim under 43 U.S.C. § 1068 (1982). There can be no peaceful, adverse possession where applicant's chain of title commences at a time when the land was withdrawn and such a claim is properly rejected.

Arizona Real Estate Exchange, Inc., 93 IBLA 1 (Sept. 18, 1986)

A Class 1 color-of-title claim requires peaceful adverse possession in good faith by claimant or predecessors in interest under claim or color of title for the prescribed period of time. The claim or color of title must be based upon a document from a party other than the U.S. Government which on its face purports to convey the claimed land to the applicant or the applicant's predecessors.

Parsons & Ford Lawson, 94 IBLA 220 (Nov. 10, 1986)

The Department of the Interior cannot grant a color-of-title application for land that was patented and is no longer public land.

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James P. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)

DESCRIPTION OF LAND

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey

COLOR OR CLAIM OF TITLE--Continued

DESCRIPTION OF LAND--Continued

included the land in the conveyance and claimant has subsequently occupied the land.

Dale P. Pettis, 90 IBLA 371 (Feb. 25, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought in omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James P. Gaylord, Jr., 90 IBLA 397 (Dec. 9, 1986)

COMMUNICATION SITES

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jancor, Inc., 93 IBLA 310 (Sept. 11, 1986)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 94 IBLA 167 (Oct. 28, 1986)

COMMUNICATION SITES--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Park, Inc., 90 IBLA 241 (Nov. 17, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may generally be rebutted only by another appraisal.

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

CONSTITUTIONAL LAW

GENERALLY

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 86 (Feb. 25, 1986) 93 I.D. 79

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

DUE PROCESS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Ernest A. Nicholi, 90 IBLA 379 (Feb. 5, 1986)

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Tenneco Oil v. Placid Oil, 90 IBLA 397 (Feb. 24, 1986)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Interest'l, Inc., 91 IBLA 68 (July 10, 1986)

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

Eugene M. Witt, 90 IBLA 365 (Jan. 31, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Mengott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

Where BLM never adjudicated a timely protest to the filing of a notice of plat of survey, and the protest disputes the conclusion that a tract of land was an unsurveyed island at the time of the original survey, the protest may be referred for a hearing.

Jerome L. Bolstad, 93 IBLA 119 (July 28, 1986)

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

United States v. Estate of George E. Patabrook, Jane A. Patabrook, Leland E. Patabrook, 90 IBLA 38 (Sept. 25, 1986)

GENERALLY

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Sandra Mengott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

Prevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious

ATTORNEY FEES--Continued

Special Circumstances--Continued

see claim in its answers to the Government's interrogatories that prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-9 (Nov 28, 1986) 93 I.B. 437

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and rejecting the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-9 (Nov 28, 1986) 93 I.B. 437

CONTRACTS

GENERALLY

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-86 et al. (Oct. 14, 1986)

CONSTRUCTION AND OPERATION

Generally

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the

CONSTRUCTION AND OPERATION--Continued

Generally--Continued

embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-86 et al. (Oct. 14, 1986)

Actions of Parties

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soils engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 3 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1631-7-82 (Feb. 13, 1986) 93 I.B. 27

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2364 (Apr. 17, 1986)

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 30 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

Bare allegations by a contractor that a BIA inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dave Cochran, IBCA-1799 (May 23, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Clatterbuck, Inc., IBCA-1726-9-87 (July 30, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1985 (Dec. 5, 1986)
93 I.D. 455

Payment for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FRV, Inc., IBCA-1782 (Dec. 23, 1986)

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1818 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 11, 1986)

The Board finds disallowed costs under a cost-reimbursement contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his

independent judgment to review each evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2047 (Mar. 31, 1986) 93 I.D. 179

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1546-3-87 (Mar. 7, 1986) 93 I.D. 144

Where the evidence established that a contractor incurred certain extra costs during excavation of the spillway trench portion of a dam project, the Board held, by the jury verdict approach, that appellant was entitled to a portion of such additional costs in the amount of $32,500.

Appeal of Clatterbuck, Inc., IBCA-1726-9-87 (July 30, 1986)

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs

Appeal of Newbery State, Inc., IBCA-1771-1-88 et al. (Oct. 14, 1986)

Changed Conditions (Differing Site Conditions)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose

from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Parchman d/b/a Parchman Trucking, IBCA-2087 (May 23, 1986)

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-88 et al. (Oct. 14, 1986)

Changes and Extras

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious

portion of the inclined dam were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined dam were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined dam) as slippery or slick.

Silverside General Construction Co., Inc., IBCA-1689-9-87 (Feb. 17, 1988)
93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Roumi Corp., IBCA-1923 (Feb. 27, 1986)
93 I.D. 93

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wichlan Contracting Co., Inc., IBCA-1901-8-79 (Mar. 31, 1988)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 7,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the

differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Pezzie Construction Co., IBCA-2184 (Apr. 30, 1988)
95 I.D. 191

Where allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Corbar, IBCA-1799 (May 23, 1986)

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 16, 1986)

Conflicting Clauses

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 16, 1986)

Construction Against Drafter

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the

contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Virginia General Construction Co., Inc., IBCA-1683-3-87 (Feb. 17, 1988) 93 I.B. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1988)

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbury State, Inc., IBCA-1771-1-88 et al. (Oct. 14, 1988)

Contract Clauses

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1988)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Hall, Hall & Brosamer, Inc., & Hall & Brosamer (JV), IBCA-1566-1-82 (Mar. 31, 1988) 95 I.B. 166

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dane Cochran, IBCA-1789 (May 23, 1986)

Upon finding that a contract clause, permitting a price adjustment in multiyear and option contracts, confined the adjustment to actual increases or decreases during the option or renewal periods of the contract, and that the contractor claimed an adjustment for the initial period of the contract upon receiving notice after the award of an increase in Federal and state unemployment taxes, the Board denies the appeal because it could find no other contract clause permitting an adjustment for the initial period of the contract.

Appeal of Eagle Security, Div. of Wadoco, Inc., IBCA-1917 (July 24, 1986)

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract

consensus, the contractor's claim for the timber in addition to its costs and a reasonable profit on the work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1908 (Aug. 13, 1986)

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Clatterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986)
93 I.D. 358

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Contracting Officer

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986)
93 I.D. 27

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted

mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simpson, IBCA-2058 (Feb. 24, 1986)
93 I.D. 76

The Board finds disallowed costs under a cost-reimbursement contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1986)
93 I.D. 139

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Maxima Corp., IBCA-1828 (Apr. 1, 1986)
93 I.D. 151

Where the contracting officer, by letter to the contractor, designated a refuge manager as supervisor of the contract work at the refuge where the work was to be performed, pursuant to a contract provision which includes the duly appointed successor or authorized representative in the definition of "contracting officer," and where the specifications named the refuge manager as the one with whom the work was to be scheduled in order not to interfere with the operation of the refuge, the Board rejects the argument of apparent authority and finds express authority for the refuge manager to control the work.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 29, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the

termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1985 (Dec. 5, 1986) 93 I.D. 455

Contractor

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Hall, Hall & Brosamer, Inc., & Hall & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

Differing Site Conditions (Changed Conditions)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Kazzie Construction Co., IBCA-2108 (Apr. 30, 1986) 93 I.D. 191

The Board holds that the contractor failed to sustain its burden of establishing entitlement to any of its claims for extra costs; that such costs were the direct result of the contractor's failure to make a reasonable site investigation, together with its failure to carefully read the contract drawings and the specifications, prior to submitting its bid. In such circumstances the risk of incurring such costs must fall upon the contractor and not upon the Government.

Appeal of Bovie & K Enterprises, Inc., IBCA-1788 (Oct. 7, 1986)

Drawings and Specifications

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1918 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

Drawings and Specifications--Continued

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-88 et al. (Oct. 14, 1986)

Duration of Contract

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 339-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Wichita Contracting Co., Inc., IBCA-1781-8-79 (Mar. 31, 1986)

Duty to Inquire

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newbery State, Inc., IBCA-1771-1-88 et al. (Oct. 14, 1986)

General Rules of Construction

Where, in the context of a $28 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brindregon Corp., IBCA-1818 (Jan. 31, 1986)

General Rules of Construction--Continued

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programing costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Hall, Hall & Pronsper, Inc., & Hall & Prosper (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 104

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Claterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986) 93 I.D. 358

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Delays of Parties

Prompt for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PPM, Inc., IBCA-1967 (Jan. 23, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programing costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Yazzie Construction Co., IBCA-2104 (Apr. 30, 1986) 93 I.D. 191

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing

the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Subcontractors and Suppliers

Where a contractor is notified by a subcontractor after the primary contract is let that the subcontractor has made a unilateral pricing mistake and cannot perform its work without additional compensation, and the contractor voluntarily pays a substantial part of the additional compensation, such costs must be borne by the contractor and not by the Government, unless the Government had reason to be aware of the subcontractor's mistake before the contract was let.

Where a successful bidder on a firm fixed-price construction contract unqualifiedly agrees, before the contract is let, to extend the time for the Government's acceptance of its bid and, after the contract is let, encounters unanticipated price increases by its intended suppliers, the Government is not liable for the cost of the increases since it is entitled to rely on the contractor's original bid, and the contractor could have protected itself against such increases through previous arrangements with its suppliers.

Appeal of Kitchens Construction, Inc., IBCA-2192 et al. (July 16, 1986)

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Waiver and Estoppel

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the CCE in approving the employment by the contractor of a soils technician was an informal

accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

CONTRACT DISPUTES ACT OF 1978

Attorney Fees

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986) 93 I.D. 437

Interest

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986) 93 I.D. 131

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.D. 250

Jurisdiction

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (1) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months

as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim presented for the first time in the complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 136

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.D. 250

Where a contractor files a notice of appeal with the Board, from a decision of a contracting officer terminating the contract for default, more than a year after the decision was received by the contractor, the Board holds that the appeal is not within its jurisdiction to consider because of failure to comply with the 90-day rule for filing appeals to Boards of

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

Contract Appeals, as provided in sec. 7 of the Contract Disputes Act of 1978.

Appeal of C. G. Norton Co., Inc., IBCA-2068 (June 25, 1986) 93 I.D. 25a

DISPUTES AND REMEDIES

Generally

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 17, 1986) 93 I.D. 131

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Burden of Proof

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a submission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

PKW, Inc., IBCA-1942 (Jan. 23, 1986)

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the

Government as a result of the contractor's failure to complete the contract work.

Appeal of Chemise Timberland Services, Inc., IBCA-1961 (Feb. 28, 1986)

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-88 (Mar. 6, 1986)
93 I.D. 127

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Dechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2064 (Apr. 17, 1986)

Mere allegations by a contractor that a site inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1749 (May 23, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract commences, the contractor's claim for the timber in addition to its costs and a reasonable profit on the work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1938 (Aug. 13, 1986)

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986)
93 I.D. 455

Damages

Generally

Where the causative link between the Government's misfeasance and the contractor's damage has already been established, there is nothing inately inadmissible about estimate testimony presented to show the amount of that damage; the strict rule limiting the admissibility of estimate testimony applies only to those estimates offered to attempt to establish the causative link, not those offered to prove the amount of damage once the link has already independently been established.

Appeal of RECO, Inc., IBCA-1693-6-87 (Aug. 6, 1986) 93 I.D. 323

Actual Damages

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Liquidated Damages

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Measurement

Where the contractor's proof on quantum stands largely unopposed, but consists largely of estimates and approximations, it may nevertheless establish the facts for which it is introduced to the extent that it is or can be tied to verifiable record events or is otherwise sufficiently detailed to dispel doubts about its accuracy; when such evidence fails to rise to such a level, then it may be disregarded or accorded no more probative weight than any other uncorroborated evidence of similar description; if no other persuasive evidence is introduced on the quantum issue, then the Board may use the jury verdict approach to determine the same.

Appeal of RECO, Inc., IBCA-1693-6-87 (Aug. 6, 1986) 93 I.D. 323

Equitable Adjustments

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the

appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 6-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 6-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 6-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 6-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Fitzgerald General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986)
93 I.D. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986)
93 I.D. 92

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Fruchtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Where the evidence established that a contractor incurred certain extra costs during excavation of the spillway trench portion of a dam project, the Board held, by the jury verdict approach, that appellant was entitled to a portion of such additional costs in the amount of $32,500.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Claterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986)
93 I.D. 358

Jurisdiction

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in

the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claim.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 136

Substantial Evidence

Where, in the context of a $26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Briscoe Corp., IBCA-1814 (Jan. 31, 1986)

Termination for Convenience

Imposition of excess costs for a reprocurement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Maxima Corp., IBCA-1828 (Apr. 1, 1986) 93 I.D. 151

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract commences, the contractor's claim for the timber in

addition to its costs and a reasonable profit on the work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1939 (Aug. 17, 1986)

Termination for Default

Generally

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simpson, IBCA-2054 (Feb. 24, 1986) 93 I.D. 74

Where the Government enters into a fire fixed-price contract for the construction of a fence that is to be completed within 2* days after the contractor's receipt of a notice to proceed, and 13-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

The Board holds a default termination to have been improper, and deems the termination to have been for the convenience of the Government, where the record shows that a suspension of work order had not been lifted and the contract completion time had not expired, at a time when the Government was issuing cure notices and concurrently insisting that the contractor submit an unrequired proposal for approval of intended corrective measures.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 28, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the

termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1765 (Dec. 5, 1986) 93 I.D. 455

Excess Costs

Imposition of excess costs for a reprocurement focused on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the Darby rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Michigan Contracting Co., Inc., IBCA-1301-8-76 (Mar. 31, 1986)

FORMATION AND VALIDITY

Authority to Make

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 93 IBLA 98 (Dec. 29, 1986)

Bid Award

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of $5 per acre was established by the advertised terms of sale, a bid for $1.30 was properly rejected

John L. Pehrson, 92 IBLA 68 (May 22, 1986)

Forfeiture

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Sarina Corp., IBCA-1928 (Apr. 1, 1986) 93 I.D. 151

Mistakes

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newberry State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Generally

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Acceptance of Performance

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986) 93 I.D. 455

Breach

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

Excusable Delays

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 222-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Inspection

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not

sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dale Cochran, IBCA-1799 (May 27, 1986)

Release and Settlement

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Constructors, Inc., IBCA-1830 (Mar. 12, 1986)
93 I.D. 171

Substantial Performance

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J F C Electric Motor Service, IBCA-2064 (Apr. 17, 1986)

Suspension of Work

The Board holds a default termination to have been improper, and deems the termination to have been for the convenience of the Government, where the record shows that a suspension of work order had not been lifted and the contract completion time had not expired, at a time when the Government was issuing cure notices and concurrently insisting that the contractor submit an unrequired proposal for approval of intended corrective measures.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 24, 1986)

Under a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the contracting officer suspended performance resulting in a 3-week delay to the contractor in order to comply with an unscheduled airworthiness inspection order, issued because of the crash of a similar C-119 aircraft in California, but having no relationship to the subject contract aircraft. The Board found that the Government failed to prove the contractor's aircraft to be unairworthy; that the suspension of the work for the emergency inspection, although authorized under the contract, was for the convenience of

the Government, not based on the fault or negligence of the contractor, and was for an unreasonable period. The Board concluded that the contractor was entitled to an equitable adjustment pursuant to the suspension clause and awarded the contractor lost availability payments and its extra inspection costs plus interest.

Appeal of Hastings & Towers Aviation, Inc., IBCA-1638-8-82 (Sept. 8, 1986)
93 I.D. 184

CONVEYANCE

GENERALLY

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Mayna Cook, 93 IBLA 161 (Jan. 8, 1986)

RESERVATIONS

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the contained right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Poquiet, 90 IBLA 169 (Jan. 8, 1986)

RESERVATIONS AND EXCEPTIONS

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 90 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

DESERT LAND ENTRY

GENERALLY

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. James M. Mills, 91 IBLA 370 (Apr. 28, 1986)

GENERALLY--Continued

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Marlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

APPLICATIONS

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Marlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

CANCELLATION

The Government, by granting an extension of time to an entryman in which to make his proof of a completed desert land entry, is not estopped from a later rejection of that entry by virtue of the fact that an extension of time was allowed. When, at the time of granting the entryman additional time to prove he conveyed water upon desert land, the Government cautioned the entryman that he would be required to prove compliance with his irrigation plan, the entryman had notice he would be required to show his plan of reclamation had been completed when final proof was made.

United States v. James M. Mills (On Reconsideration), 94 IBLA 59 (Sept. 26, 1986)

WATER RIGHT

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

DESERT LAND ENTRY--Continued

WATER RIGHT--Continued

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Marlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

WATER SUPPLY

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. James M. Mills, 91 IBLA 170 (Apr. 28, 1986)

ENVIRONMENTAL QUALITY

GENERALLY

The issuance of a special recreation use permit for the 1986 version of the Barrow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Rojave National Park, 91 IBLA 309 (Apr. 15, 1986)

ENVIRONMENTAL STATEMENTS

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 200 (June 26, 1986)

EQUAL ACCESS TO JUSTICE ACT

Generally

The apparent purpose of sec. 504(c)(1) is to give the court to which an agency action is appealed sole authority to hear and decide applications for fees and expenses for the costs of both judicial review and the underlying administrative proceeding.

A decision of this Board [an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. § 554 (1982).

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Denton C. Carle, 93 [illegible] 211 (Aug. 20, 1986)

CONTRACT DISPUTES ACT OF 1978

Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

Prevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov 28, 1986)
93 I.D. 437

ESTOPPEL

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.: the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulation, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

William Perlman, 91 IBLA 208 (Apr. 2, 1986)
93 I.D. 159

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

Reliance on erroneous or incomplete information given by an employee of the Department will not excuse an oil and gas operator from compliance with applicable law and regulations.

Yard Petroleum Corp., 93 IBLA 247 (Aug. 29, 1986)

EVIDENCE

BURDEN OF PROOF

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings of a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 285 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

BURDEN OF PROOF--Continued

When the Government rejects a competitive oil and gas lease high bid because it was less than the private tract valuation and presents sufficient documentation supporting its valuation, the bidder must not only disprove the Government's fair market value estimates, but must also prove that his bid constitutes fair market value.

L. K. Rogers, 94 IBLA 207 (Nov. 4, 1986)

CREDIBILITY

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Agnes Mary Moore, 91 IBLA 387 (Apr. 21, 1986)

HEARSAY

Hearsay evidence is admissible as an exception to the general rule in Departmental probate of Indian trust estates when it pertains to matters of family history, relationship, and pedigree.

Estate of Henry W. George, 15 IBIA 89 (Nov. 17, 1986)

PRESUMPTIONS

Where the record does not indicate receipt of a document purportedly sent, a legal, but rebuttable, presumption exists that administrative officials did not receive the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

BLM may properly issue a notice of incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations with respect to an oil and gas lease, where that document is not in the record and the presumption that BLM did not lose or misplace it has not been rebutted.

Apollo Energy Inc., 94 IBLA 158 (Oct. 21, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 348 (Nov. 26, 1986)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

PRIMA FACIE CASE

Where the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant does come forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

United States v. Estate of George D. Fairbrook, John J. Fairbrook, Leland F. Fairbrook, 94 IBLA 28 (Sept. 27, 1986)

SUFFICIENCY

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 191 (Sept. 18, 1986)

A person claiming ownership of wild free-roaming horses on the public lands must present evidence of ownership to the authorized officer who may issue authorization for a roundup, specifying a reasonable time to effect gathering of the animals claimed. The criterion as to reasonable time is set where BLM has recognized a claim for 5 years and has granted four extensions during that period to effect gathering. Where the successor in interest to the original claimant presented a claim to an uncertain number of progeny, remote by several generations from the animals of the original claim, BLM properly refused to recognize such claim.

Raymond G. Roseglund, 93 IBLA 308 (Nov. 21, 1986)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

EXCHANGES OF LAND

GENERALLY

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved

GENERALLY--Continued

is the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Henditours Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or any interests therein if the public interest will be well served by such exchange.

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), states that the values of lands exchanged by the Secretary under the Act either shall be equal, or if not equal, should be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per

centage of the total value of the lands or interests transferred out of Federal ownership.

Samoa Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

FEDERAL EMPLOYEES AND OFFICERS

GENERALLY

A determination establishing quarters rental rates which reflect reasonable rental value consistent with rates charged for comparable private housing in the surrounding community will be affirmed where the record shows the determination was made in accordance with accepted appraisal procedures pursuant to Departmental directives, and the quarters occupants have not established error in the determination.

Appeal of Patrick D. Gorringer, Wayne L. Parimuth, Samuel L. Paul, & Robert Leonard, 7 ORA 6 (Oct. 2, 1986)

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aspiller, 94 IBLA 315 (Nov. 28, 1986)

AUTHORITY TO BIND GOVERNMENT

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

Reliance on erroneous or incomplete information given by an employee of the Department will not excuse an oil and gas operator from compliance with applicable law and regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 294

CONFLICT OF INTEREST

Appellant did not establish that the objection of his bid on a timber sales contract involved a conflict of interest on the part of a Bureau of Indian Affairs employee, but the allegation warrants discussion in the decision on remand.

Earl Yellie v. Area Dir., et. Billings Area Office, Bureau of Indian Affairs, 95 IBLA 68 (Oct. 30, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed is to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--those clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 382 (Feb. 26, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Polah, 94 IBLA 121 (Oct. 9, 1986)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4 (b)

Joe Ostrenger, Jack Stacy, 94 IBLA 229 (Nov. 18, 1986)

ASSESSMENT WORK

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

CALIFORNIA DESERT CONSERVATION AREA

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Inyo Audubon Society, Citizens for Bodaya National Park, 91 IBLA 300 (Apr. 15, 1986)

CONVEYANCES

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested administrative costs as required by 43 CFR 2720.1-3(b)(1), the application is properly rejected.

Niles E. Thie Corp., 93 IBLA 128 (July 29, 1986)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

CORRECTION OF CONVEYANCE DOCUMENTS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Minton, Marylee Minton, 91 IBLA 108 (Mar. 14, 1986)

DISCLAIMERS OF INTEREST

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, As amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 25, 1986) 93 I.D. 66

EXCHANGES

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Bondiburre Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

GRAZING LEASES AND PERMITS

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(3) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

LAND USE PLANNING

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

PERMITS

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Assn., 93 IBLA 103 (July 23, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

Issuance of a patent to a state without mineral reservation reserves the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Instruments required to be filed with BLM by 43 U.S.C. § 1744(a) (1982), must identify the claim or claims for which they are filed by giving the correct claim name, the correct BLM assigned claim number, or a description of each claim sufficient to locate it on the ground.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Pteredigon Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recordation office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Robert C. Bishop et al., 91 IBLA 199 (Aug. 18, 1986)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Elizabeth S. Mjellen et al., 93 IBLA 203 (Aug. 20, 1986)

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the requirement that it be filed with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

An unpatented mining claim located after Oct. 21, 1976, is properly declared abandoned and void where the claimant failed to file either an affidavit of annual assessment work, a notice of intention to hold the claim, or a detailed report under 30 U.S.C. § 28-1 (1982) prior to Dec. 31, regardless of whether the claimant was entitled to or granted deferment of annual assessment work.

Marcus R. Schneider, 94 IBLA 239 (Nov. 12, 1986)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aupiller, 94 IBLA 315 (Nov. 24, 1986)

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Although 43 U.S.C. § 1744(a) does not prescribe the form a notice of intention to hold a mining claim must take, not every document sent to BLM from which intent might be inferred is sufficient. Rather, whatever the form of the instrument, it must be filed with BLM as a notice of intent. It must indicate that the claim owner continues to have an interest in the claim. It must also be a copy of the document which was or will be recorded with the county or local recorder's office. The instrument must also include a description of the location of the mining claim sufficient to locate the claimed lands on the ground, the BLM assigned claim number, or the name of the claim.

Add-Ventures, Ltd., 95 IBLA 88 (Dec. 19, 1986)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

found and identified on the ground by following the information in the recorded description.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. May, 91 IBLA 181 (Mar. 28, 1986)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jennie A. Wagey, Harold E. McNally, 92 IBLA 228 (June 24, 1986)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on more than one occasion and more than one mining recordation serial number has been assigned to the claim, the proper corrective procedure is to merge the respective files. If, on a combined basis, all requisite filings have been made, the claim should not be declared abandoned and void for failure to comply with 43 U.S.C. § 1744(b) (1982).

Michael E. Flynn, 92 IBLA 327 (June 17, 1986)

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

A mining claim recordation document sent to the proper office of BLM in an envelope provided by BLM, affixed with the proper postage by weight, and postmarked on or prior to Dec. 30, but returned for additional postage because of the oversize nature of the envelope, will be considered to have been filed in a timely manner pursuant to 43 CFR 3833.0-5(m), when additional postage is affixed, and the letter is received by BLM before Jan. 19 of the following year.

Oro Fino Dredging Co., 93 IBLA 11 (Sept. 18, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1917, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 93 IBLA 121 (Oct. 9, 1986)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4(b)

Joe Ostrenger, Jack Stacy, 93 IBLA 229 (Nov. 10, 1986)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

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RIGHTS-OF-WAY

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosler, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or

RIGHTS-OF-WAY--Continued

authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jancor, Inc., 93 IBLA 210 (Sept. 11, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barber, 94 IBLA 67 (Sept. 29, 1986)

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, Jr., 94 IBLA 138 (Oct. 21, 1986)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 94 IBLA 167 (Oct. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

RIGHTS-OF-WAY--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may generally be rebutted only by another appraisal.

Texa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

Use of public lands for the purpose of conducting military maneuvers is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982).

Dept. of the Army, 95 IBLA 52 (Dec. 19, 1986)

RULES AND REGULATIONS

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

SALES

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested administrative costs as required by 43 CFR 2720.1-3(b)(1), the application is properly rejected.

Niles M. Thim Corp., 93 IBLA 128 (July 29, 1986)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

SALES--Continued

Under sec. 203(f) of FLPMA, 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which adequately accommodates the preference rights of the adjacent landowners where they all have an equal opportunity to submit sealed bids for a small parcel that does not lend itself to a division among the adjoining landowners and the record does not support a direct sale to any one of the preference bidders.

Where the regulations in 43 CFR 2711.1-2(a) governing a notice of realty action for public sale require that a notice identifying a tract for sale be sent to parties in interest by BLM 60 days prior to the sale, and provide for a 45-day comment period, a notice not timely sent to an interested party will not negate the sale where the party asserting the deficiency had actual notice of the sale, had an opportunity to comment and participate in the sale, and was not prejudiced by BLM's failure to provide a timely notice.

Richard D. & Virginia Troon, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Competitive bidding procedures are mandated for public sales under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), unless equitable considerations or public policies indicate modified competitive bidding or noncompetitive bidding procedures may be employed. Where the lands to be sold are within a developing or urbanizing area, competitive bidding procedures may be appropriate even though an adjoining landowner protests on the grounds the potential uses of the lands may adversely affect him.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

WILDERNESS

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 128 (Mar. 19, 1986)

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Amoco Production Co. et al., 92 IBLA 333 (June 30, 1986)

When an oil and gas lease of lands located within a wilderness study area is issued after enactment of the Federal Land Policy and Management Act of 1976, subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability, and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, the denial is not a restriction tantamount to a suspension under 30 U.S.C. § 209 (1982).

Beartooth Oil & Gas Co., 94 IBLA 115 (Oct. 9, 1986)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required * * * by applicable law" under 43 U.S.C. § 1734(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986)
93 I.D. 285

FEES

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barber, 94 IBLA 67 (Sept. 29, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

FISH AND WILDLIFE SERVICE

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness

lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

GRAZING AND GRAZING LANDS

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(2), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe R. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 200 (June 12, 1986)

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 93 IBLA 109 (July 28, 1986)

GRAZING LEASES

CANCELLATION OR REDUCTION

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 93 IBLA 109 (July 28, 1986)

PREFERENCE RIGHT APPLICANTS

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

RENEWAL

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

GRAZING PERMITS AND LICENSES

ADJUDICATION

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

CANCELLATION OR REDUCTION

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe R. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 200 (June 12, 1986)

GRAZING PERMITS AND LICENSES--Continued

TRESPASS

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John W. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

HEARINGS

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nicholi, 90 IBLA 273 (Feb. 5, 1986)

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Hondoo River & Trails, 91 IBLA 296 (Apr. 15, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

HOMESTEADS (ORDINARY)

MINERAL RESERVATION

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

INDIAN PROBATE

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Generally

The person challenging an Administrative Law Judge's decision in the Departmental probate of a deceased Indian's trust estate bears the burden of proving error.

Estate of Charles James Roane, 14 IBIA 265 (Sept. 25, 1986)

Estate of Henry W. George, 15 IBIA 89 (Nov. 17, 1986)

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index.)

Generally

The failure of a man to acknowledge paternity of an illegitimate child to his family is not sufficient to prove he is not the father.

Estate of Paul Leon Wasteth, 14 IBIA 123 (May 30, 1986)

Although preferable, documentary evidence of paternity is not a prerequisite to a finding of paternity in Departmental probate of Indian trust estates.

Estate of Henry W. George, 15 IBIA 89 (Nov. 17, 1986)

Right to Inherit

Child from Father

Under 25 U.S.C. § 371 (1982), an illegitimate Indian child is entitled to inherit trust property from the person shown to be the father.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)

Tort of Decedent

A claim sounding in tort against a deceased Indian's trust estate is properly rejected if it has not been reduced to judgment in a court of competent jurisdiction.

Estate of Hattie Jones Aseperry, 14 IBIA 192 (July 28, 1986)

DIVORCE (See also CLAIM AGAINST ESTATE--if included in this Index.)

Generally

If a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage.

Estate of Ramon Clifford Moreno, 15 IBIA 73 (Dec. 19, 1986)

EVIDENCE

Generally

The person seeking reopening of an Indian probate bears the burden of proving error in the initial decision, even where reopening is sought for the sole purpose of establishing Indian blood quantum or Indian status.

Estate of Joseph Dupoint, 15 IBIA 59 (Nov. 28, 1986)

Hearsay Evidence

Hearsay evidence is admissible as an exception to the general rule in Departmental probate of Indian trust estates when it pertains to matters of family history, relationship, and pedigree.

Estate of Henry H. George, 15 IBIA 89 (Nov. 17, 1986)

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING--if included in this Index.)

Generally

An individual who has been found to be an heir of an Indian decedent does not forfeit the right to participate in the estate by failing to attend a rehearing in which that heirship is not questioned.

Estate of Paul Leon Nesteth, 14 IBIA 123 (May 30, 1986)

INVENTORY (See also MODIFICATION OF INVENTORY--if included in this Index.)

Property Erroneously Excluded or Included

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Max Door, 14 IBIA 128 (May 30, 1986)

MARRIAGE

Generally

If a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior

MARRIAGE--Continued

Generally--Continued

to the second marriage.

A marriage cannot be presumed in the face of specific evidence to the contrary.

The party attacking the continuity of a marriage bears the burden of proof

Estate of Ramon Clifford Moreno, 15 IBIA 73 (Dec. 19, 1986)

REOPENING

Generally

The omission of an heir is the type of manifest injustice contemplated in the reopening provisions of 43 CFR 4.242(b).

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

The person seeking reopening of an Indian probate bears the burden of proving error in the initial decision, even where reopening is sought for the sole purpose of establishing Indian blood quantum or Indian status.

Estate of Joseph Dupoint, 15 IBIA 59 (Nov. 28, 1986)

Waiver of Time Limitation

The Secretary of the Interior, acting through the Board of Indian Appeals and Administrative Law Judges (Indian Probate) pursuant to authority delegated in 43 CFR 4.242(b), has discretionary authority to reopen a closed Indian probate at any time under appropriate circumstances.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

STATE LAW

Applicability to Indian Probate, Testate

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

Pretermitted Heir

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)

Children, Disinheritance of

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 8, 1986)

Construction of

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 8, 1986)

Disapproval of Will

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 8, 1986)

Undue Influence

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

In order to rebut the presumption of undue influence arising from the existence of a special confidential relationship between an Indian testator and the principal beneficiary under the will, the will proponent must show that the effects of the will were thoroughly discussed with the testator by an objective, independent person.

Estate of Jesse Paynee, 15 IBIA 64 (Dec. 2, 1986)

INDIANS

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the

GENERALLY--Continued

boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

ALASKA NATIVES

Generally

The surviving spouse of an original purchaser of a Noonah War House has an equitable claim for that house superior to the claims of the purchaser's descendants.

John Marvin v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 260 (Sept. 10, 1986)

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1681 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

BLOOD QUANTUM

The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certificates of degree of Indian blood.

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)
93 I.D. 13

CIVIL RIGHTS

Indian Civil Rights Act of 1968

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being

CIVIL RIGHTS--Continued

Indian Civil Rights Act of 1968--Continued

violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

CONTRACTS

Generally

As is the initial decision whether or not to approve a contract affecting an Indian tribe, the decision whether or not the contract should be extended, and, if extended, the terms of the extension, are matters committed to the discretion of the Secretary of the Interior.

Quinault Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 2, 1986)

HOUSING

Home Improvement Program Funds

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 203 (Sept. 2, 1986)

HUNTING, FISHING, AND GATHERING RIGHTS

Generally

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

The use of Columbia River in-lieu fishing sites for permanent residences or for the permanent storage of trailers and other personal property violates 25 CFR Part 248.

David Sohappy, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 100 93 I.D. 176 (Apr. 8, 1986)

LANDS

Generally

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Max Door, 14 IBIA 128 (May 30, 1986)

LANDS--Continued

Generally--Continued

Lands set apart as an Indian reservation cease to be a part of the public domain, and a mining claim located on Indian lands not opened to mineral entry is null and void ab initio.

Haldon Mining, 94 IBLA 93 (Oct. 1, 1986)

Allotments on Public Domain

Lands Subject to

Where a Paiute Indian files an Indian allotment application for land located in New Mexico, pursuant to sec. 9 of the Act of Dec. 22, 1974, 25 U.S.C. § 640d-8 (1982), which provides only for the allotment of certain land in Arizona to qualified Paiute Indians, the application is properly rejected.

Claudius A. Hatch, 91 IBLA 80 (Mar. 10, 1986)

LAW AND ORDER

Tribal Constitutions, Bylaws, and Ordinances

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body

When a tribal governing body legislates to disenfranchise members who fall within a class of voters described in the tribal constitution, the legislation must be carefully scrutinized for validity.

In certain narrow circumstances, tribal legislation which disenfranchises members who fall within a class of voters described in the tribal constitution may be upheld.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

The Bureau of Indian Affairs has the right to apply tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Where a tribal constitution is clear upon its face, and the ordinary meaning of its language admits of only a single interpretation, the Bureau of Indian Affairs correctly applied unambiguous provisions of the constitution establishing the powers of the tribal government's various committees when it refused to

LAW AND ORDER--Continued

Tribal Constitutions, Bylaws, and Ordinances--Continued

approve a budget prepared by the Kiowa, Comanche and Apache Intertribal Land Use Committee.

Kiowa, Comanche & Apache Intertribal Land Use Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 207 (Aug. 1, 1986)

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

The Bureau of Indian Affairs has the right to interpret tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 13 (Oct. 16, 1986)

LEASES AND PERMITS

Generally

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986)
93 I.D. 159

Cancellation or Revocation

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

LEASES AND PERMITS--Continued

Development Leases

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Strobe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 111 (May 21, 1986)

Rental Rates

The mere fact that a rental rate adjustment is lower than the rate suggested in an appraisal of the property does not justify the lower rate. In order to be supported by substantial evidence, the decision imposing the rental rate must show the reasons for the adjustment actually made.

Bien Hur Indian Market Center v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 231 (Aug. 11, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a rental adjustment was based on substantial evidence, the matter will be referred for an evidentiary hearing and recommended decision.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 5 (Oct. 8, 1986)

Violation/Breach

Generally

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

MINERAL RESOURCES

Oil and Gas

Generally

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlmad, 91 IBIA 208 (Apr. 2, 1986)
93 I.D. 159

OSAGE HEADRIGHTS

Income accruing from an Osage Indian headright is properly paid to the owner or owners of the headright on the segregation date.

Estate of Vivian M. Rogers v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 14 IBIA 217 (Aug. 8, 1986)

TAXATION

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

TIMBER RESOURCES

Timber Sales Contracts

Generally

Appellant did not establish that the rejection of his bid on a timber sales contract involved a conflict of interest on the part of a Bureau of Indian Affairs employee, but the allegation warrants discussion in the decision on remand.

The regulations governing timber sales from tribal land authorize rejection of a high bid if the high bidder is considered unqualified to perform the contract or if there are reasonable grounds to consider it in the interest of the Indians to reject the high bid. 25 CFR 163.11(a).

The determination of whether a high bidder is qualified to perform a timber sales contract or whether rejection of a high bid is in the interest of the Indians is a determination requiring the exercise of discretion.

Earl Vielle v. Area Director, Billings Area Office, Bureau of Indian Affairs, 15 IBIA 40 (Oct. 30, 1986)

TRIBAL GOVERNMENT

Generally

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter to the attention of appropriate tribal officials.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

Elections

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

When a tribal governing body legislates to disenfranchise members who fall within a class of voters described in the tribal constitution, the legislation must be carefully scrutinized for validity.

In certain narrow circumstances, tribal legislation which disenfranchises members who fall within a class of voters described in the tribal constitution may be upheld.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

Judicial System

The extent of a tribal court's jurisdiction should be raised first to the court, rather than being addressed through collateral attack before the Bureau of Indian Affairs.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

TRIBAL POWERS

Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter to the attention of appropriate tribal officials.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

Self-Determination

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

Tribal Sovereignty

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

LACHES

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Delay by BIM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

MILLSITES

GENERALLY

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use

MILLSITES--Continued

GENERALLY--Continued

should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Elmer H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

DEPENDENT

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

United States v. Elmer H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

DETERMINATION OF VALIDITY

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970),

MILLSITES--Continued

DETERMINATION OF VALIDITY--Continued

but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Elmer H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

Fletcher De Fisher, Fisher Interest'l, Inc., 93 IBLA 68 (July 15, 1986)

MINERAL LANDS

MINERAL RESERVATION

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

Hulda Boutsen, 90 IBLA 310 (Feb. 24, 1986)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 271 (Aug. 20, 1986)

MINERAL RECLAMATION--Continued

Where BLM rejects the land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM imposes a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2091.3-1(c)(2).

Joseph M. Bassett et al., 95 IBLA 187 (Dec. 31, 1986)

PROSPECTING PERMITS

If all the requirements for issuance of a prospecting permit, including those requirements found at 43 CFR Subpart 3548 are met, it is proper for BLM to issue a prospecting permit for lands within the Whiskeytown-Shasta-Trinity National Recreation Area.

Bureau Exploration, Inc., 91 IBLA 55 (Feb. 28, 1986)

In June 1981 a 2-year extension of a prospecting permit properly ran from the date of expiration of the primary term of the permit and a BLM decision purporting to extend the term beyond that 2-year period was improper. Thus, when a prospecting permit applicant filed an application for certain lands covered by the extension shortly after the expiration of the 2-year period, the land was available and that applicant established priority such that a subsequent application was properly rejected by BLM.

Crown Resources Corp., 91 IBLA 180 (Mar. 28, 1986)

A solids prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date.

Steve Dwyer, 93 IBLA 283 (Aug. 29, 1986)

MINERAL LEASING ACT

GENERALLY

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

GENERALLY--Continued

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 17, 1986)

The Board of Land Appeals will not reverse an unreasonable readjustment of a coal lease to establish a 12-1/2 percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

Spring Creek Coal Co., 94 IBLA 331 (Nov. 25, 1986)

Pacificorp., 95 IBLA 16 (Dec. 12, 1986)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co. et al., 94 IBLA 352 (Dec. 1, 1986)

ENVIRONMENT

Issuance of mineral leases within the Flaming Gorge National Recreation Area require the consent of the Secretary of the Interior based on a finding that such disposition "would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460v-4 (1982). Where an issue of fact is raised by the record concerning the potential impact of subsidence on the Colorado River basin, this issue may be referred for a hearing pursuant to 43 CFR 4.415.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

LANDS SUBJECT TO

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended. 30 U.S.C. § 181 (1982).

Daniel C. Erchinger, 92 IBLA 10 (May 6, 1986)

Issuance of mineral leases within the Pinnacles Forest National Recreation Area require the consent of the Secretary of the Interior based on a finding that such disposition "would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460y-8 (1982). Where an issue of fact is raised by the record concerning the potential impact of subsidence on the Colorado River basin, this issue may be referred for a hearing pursuant to 43 CFR 4.415.

John S. Wold, Eugene T. Simons, 95 IBLA 69 (Dec. 22, 1986)

RENTALS

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

ROYALTIES

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM

ROYALTIES--Continued

remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" BLM received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute. 30 U.S.C. § 201(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986) 93 I.D. 394

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 218.150 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 218.150.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. An order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 215 (Nov. 5, 1986)

MINING CLAIMS

GENERALLY

Issuance of a patent to a state without mineral reservation reserves the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

CONTESTS--Continued

The primary purpose of the Mining Law of 1872, 30 U.S.C. § 22 et seq., is the disposal of mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect.

Adams v. Intralateral Rights Issues Raised by the Utility-Water Mineral Patent, [illegible] (Sept. 30, 1986)

93 I.D. 349

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed where the record discloses appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyra-Yuma II Mining Ass'n, 91 IBLA 278 (Apr. 28, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 90 IBLA 121 (Oct. 9, 1986)

ABANDONMENT

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Pinkerton Co., Inc., 91 IBLA 117 (Mar. 17, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. May, 91 IBLA 181 (Mar. 28, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going

ABANDONMENT--Continued

to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandia Manager (On Reconsideration), 93 IBLA 113 (July 30, 1986)

With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recordation office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Robert C. Bishop et al., 93 IBLA 199 (Aug. 18, 1986)

A mining claim recordation document sent to the proper office of BLM in an envelope provided by BLM, affixed with the proper postage by weight, and postmarked on or prior to Dec. 30, but returned for additional postage because of the oversize nature of the envelope, will be considered to have been filed in a timely manner pursuant to 43 CFR 3833.0-5(b), when additional postage is affixed, and the letter is received by BLM before Jan. 10 of the following year.

Oro Plus Dredging Co., 91 IBLA 11 (Sept. 18, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 90 IBLA 121 (Oct. 9, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the requirement that it be filed with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and

void because of the absence of that document from the file.

Beth Irene Bachatheny, 94 IBLA 198 (Oct. 30, 1986)

An unpatented mining claim located after Oct. 21, 1976, is properly declared abandoned and void where the claimant failed to file either an affidavit of annual assessment work, a notice of intention to hold the claim, or a detailed report under 30 U.S.C. § 28-1 (1982) prior to Dec. 31, regardless of whether the claimant was entitled to or granted deferment of annual assessment work.

Bruce D. Schneider, 94 IBLA 239 (Nov. 12, 1986)

ASSESSMENT WORK

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed where the record discloses appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyle-Vega II Mining Ass'n, 91 IBLA 378 (Apr. 28, 1986)

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LaPalme, 95 IBLA 26 (Dec. 12, 1986)

COMMON VARIETIES OF MINERALS

Generally

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an

investment at that time, a finding of no discovery will be affirmed.

United States v. Alter Builders Products, 95 IBLA 55 (Dec. 19, 1986)

Unique Property

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

United States v. Fiber G. Thuser et al., 90 IBLA 255 (Jan. 31, 1986)

CONTESTS

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 14 of 35 contested bentonite claims, the contest is properly dismissed as to those 14 claims. The remaining claims are properly found to be invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Bennett (On Reconsideration), 93 IBLA 113 (July 28, 1986)

DETERMINATION OF VALIDITY

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no

evidence that because of the coloration the stone would command a higher price on the market.

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable copper variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Floyd G. Thomas et al., 93 IBLA 244 (Dec. 31, 1986)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent downdip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where

inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)
93 I.D. 369

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George F. Krier, 92 IBLA 101 (May 30, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 55 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

Jim D. Schlosser et al. v. Verla Pierce et al., 92 IBLA 109 (June 6, 1986)
93 I.D. 211

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lamar & Christine Burnett, 93 IBLA 374 (Dec. 8, 1986)

DETERMINATION OF VALIDITY--Continued

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Ada-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 54 (Dec. 19, 1986)

DISCOVERY

Generally

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit.

DISCOVERY--Continued

Generally--Continued

The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

United States v. Louise Miller (Arlene R. Miller), 91 IBLA 295 (Apr. 8, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Doris Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

Marketability

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Doris Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation

and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

United States v. Silas Builders Products, 95 IBLA 55 (Dec. 19, 1986)

EXTRALATERAL RIGHTS

The primary consequence of a lode mining claimant's failure to locate his mining claim boundaries according to the actual course of the lode or vein, whether by lack of care or lack of data, is that the mining claimant may be limited in his extralateral rights to the down-dip extension of the vein.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claim covering the presumed apex and the mining claims located over the apparent down-dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)

93 I.D. 360

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher Jay Fisher, Fisher Internat'l, Inc., 93 IBLA 48 (July 15, 1986)

LANDS SUBJECT TO

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene R. Miller, 91 IBLA 285 (Apr. 8, 1986)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice F. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 14, 1964, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Ballard, Harold W. Phillips, 91 IBLA 391 (Dec. 27, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlis J. Strassburg, Wilford P. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

Lands which were acquired under the Weeks Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 22 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 475, 478 (1982).

Melvin Praszen, M. Diane Colby, 92 IBLA 20 (May 6, 1986)

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a mining claim located on land patented without a mineral reservation null and void ab initio. However, where the record indicates the claim may only partially be located on patented land, the decision will be set aside and the case will be remanded to BLM for a readjudication of the validity of the claim.

Noranda Exploration, Inc., 92 IBLA 61 (May 19, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon E. Griffin, 92 IBLA 87 (May 28, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George P. Brier, 92 IBLA 181 (May 30, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Bollingsworth, 92 IBLA 358 (June 30, 1986)

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher International, Inc., 93 IBLA 68 (July 15, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly

Leslie Corries, 93 IBLA 386 (Sept. 11, 1986)

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer

LANDS SUBJECT TO--Continued

Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

Lands set apart as an Indian reservation cease to be a part of the public domain, and a mining claim located on Indian lands not opened to mineral entry is null and void ab initio.

Waldon Mining, 94 IBLA 93 (Oct. 1, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively the location made while the lands were segregated from mineral entry.

Harold F. De Rose, 94 IBLA 350 (Nov. 28, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

LOCATION

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene F. Miller, 91 IBLA 285 (Apr. 8, 1986)

LOCATION--Continued

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error is the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher Interests, Inc., 93 IBLA 68 (July 15, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Correia, 93 IBLA 346 (Sept. 11, 1986)

LODE CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

The primary consequence of a lode mining claimant's failure to locate his mining claim boundaries according to the actual course of the lode or vein, whether by lack of care or lack of data, is that the mining claimant may be limited in his extralateral rights to the down-dip extension of the vein.

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of

a lode mining claim as an essential element is establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent downdip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)
93 I.D. 369

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corrigan, 93 IBLA 386 (Sept. 11, 1986)

MARKETABILITY

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing

the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 55 (Dec. 18, 1986)

MILLSITES

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Piper H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 15, 1986) 93 I.D. 288

MILLSITES--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 99 IBLA 194 (Oct. 30, 1987)

MINERAL LANDS

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Yorie Pierce et al., 92 IBLA 107 (June 6, 1986)
93 I.D. 211

PATENT

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral

PATENT--Continued

right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the United States Mineral Patent, 6-16955 (Sept. 19, 1986)
93 I.D. 369

PLACER CLAIMS

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 99 IBLA 249 (Jan. 30, 1986)

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Yorie Pierce et al., 92 IBLA 107 (June 6, 1986)
93 I.D. 211

An association of two locators may locate an association placer claim of 40 acres. 43 CFR 3842.1-2(c). Where evidence of record is incomplete and inconclusive as to whether mining claims were located as association placer claims on behalf of an association of locators, or were located on behalf of a corporation, the BLM decision rejecting the filing of the location notices for the claims will be set aside and the case remanded for further investigation into the exact circumstances of the location of the claims.

Donald D. Hall et al., 95 IBLA 33 (Dec. 15, 1986)

POWERSITE LANDS

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, 88 amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which

POWERSITE LANDS--Continued

is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corrigan, 93 IBLA 344 (Sept. 11, 1986)

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 178 (Dec. 8, 1986)

RECORDATION

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

RECORDATION--Continued

It was error for BLM to reject the recordation of a mining claim, centered in T. 9 S., R. 9 W., Seward Meridian, Alaska, upon the subsequent (1980) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jessie A. Hagen, Harold T. McNally, 93 IBLA 226 (June 30, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Bennett (On Reconsideration), 93 IBLA 113 (July 25, 1986)

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1971, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the requirement that it be filed with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Ruth Irene Buchsthorn, 94 IBLA 198 (Oct. 30, 1986)

DESCRIPTION--Continued

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4(b).

Joe Ostrander, Jack Stacy, 90 IBLA 229 (Nov. 18, 1986)

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aumiller, 90 IBLA 315 (Nov. 20, 1986)

RELOCATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

TUNNEL SITES

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Buckthorn, 90 IBLA 198 (Oct. 30, 1986)

WITHDRAWN LAND

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 90 IBLA 248 (Jan. 30, 1986)

WITHDRAWN LAND--Continued

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice F. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 18, 1908, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Pollard, Harold W. Pollard, 91 IBLA 391 (Apr. 29, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlie J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George F. Krier, 92 IBLA 101 (May 30, 1986)

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error is the decision appealed rests with the appellant and, in

the absence of such a showing, the decision will be affirmed.

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher International, Inc., 93 IBLA 48 (July 15, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, As amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corries, 93 IBLA 386 (Sept. 11, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively the location made while the lands were segregated from mineral entry.

Harold E. De Rose, 94 IBLA 350 (Nov. 28, 1986)

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar F. Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

MINING CLAIMS RIGHTS RESTORATION ACT

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, As amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corries, 93 IBLA 386 (Sept. 11, 1986)

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar F Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

GENERALLY

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS

Kern Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case files remanded for supplementation of the EA to consider the alternative which it failed to study

State of Wyoming Game & Fish Comm'n, 91 IBLA 364 (Apr. 24, 1986)

NAVIGABLE WATERS

Federal law must be applied by BLM to determine whether a lake is navigable in fact when determining ownership of a lakebed for purposes of issuance of a Federal oil and gas lease. In such a case, navigability depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred in 1889. An offer by the state to prove the lake was used as a waterway for commercial logging raises a sufficient issue of fact to require a fact-finding hearing to determine navigability of the lake at statehood.

State of Montana, 91 IBLA 104 (Mar. 18, 1986)

NOTICE

GENERALLY

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

NOTICE--Continued

GENERALLY--Continued

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

F. Howard Walsh, Jr., Rae Lamar Davis & Newton Lamar, 93 IBLA 297 (Sept. 9, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG Bay 1981, 94 IBLA 22 (Sept. 23, 1986)

CONSTRUCTIVE NOTICE

Where an authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication, that person will be deemed to have received the communication if it was delivered to his last address of record on file in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. 43 CFR 1810.2.

Lawrence E. Welsh, Jr., 91 IBLA 328 (Apr. 17, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

OIL AND GAS

PIPELINES

Rights-of-Ways

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

OIL AND GAS LEASES

GENERALLY

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

Under 43 CFR 3108.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and the deficiency is nominal, the lease shall not automatically have terminated unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

An assignment of an oil and gas lease is ineffective until the proposed assignment has been approved by BLM. 30 U.S.C. § 187a (1982). Until such time as the assignment is approved, the party designated as the party responsible for payment of lease rentals on the lease to be assigned remains responsible for rental payments.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3.

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit

GENERALLY--Continued

to drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Under the regulations in 43 CFR Subpart 3162 (Requirements for Lessees and Operators), an oil and gas lease operator is responsible for the submission of reports on the quantity of gas or oil produced.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

BLM may properly determine the failure to submit timely a monthly report of operations is an incident of noncompliance under 43 CFR 3162.4-3.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, P. H. Allsup, 92 IBLA 197 (June 12, 1986)

When the only reasonable construction of 43 CFR 3162.3-2(a), as evidenced by prior regulations, the rule-making process, and other regulations, is that "water shut-off" is a subsequent well operation requiring prior approval, an operator under an oil and gas lease cannot rely on the mispunctuation of the regulation as an ambiguity which can excuse failure to obtain approval prior to commencing with water shut-off activities.

Bolack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

Where BLM issues an incident of noncompliance for failure of the transporter to "isolate the sales tank" during the "sales phase" and assesses the oil and gas lease operator $250 in accordance with 43 CFR 3163.3(f), and on appeal the record indicates the transporter had not transferred any oil or engaged in any activity which would violate the integrity of the storage system, the "sales phase" had not commenced and the violations and assessments will be overturned.

Petrostates Resources, Inc., 93 IBLA 165 (Aug. 12, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to timely file a notice of production start-up may be vacated by this Board, in view of the suspension of that regulation and a change in Departmental policy that such assessments should automatically be levied.

Hard Petroleum Corp., 93 IBLA 267 (Aug. 26, 1986)

GENERALLY--Continued

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 92 IBLA 391 (Sept. 19, 1986)

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits or a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the appellant fails to provide any countervailing evidence to show the decision is in error.

Mapco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)

The number of bids received at a sale of competitive oil and gas leases on any parcel does not necessarily represent an accurate test of fair market value, as bidders may consider other factors in making their bids.

L. E. Rogers, 94 IBLA 202 (Nov. 6, 1986)

Automatic assessments for failure to file timely production reports pursuant to 43 CFR 3163.3(h) are vacated in deference to a later issued BLM Instruction Memorandum suspending enforcement of 43 CFR 3163.3(h).

Davis Oil Co., 94 IBLA 325 (Nov. 28, 1986)

ACQUIRED LANDS LEASES

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Puckstuhl, 91 IBLA 389 (Apr. 28, 1986)

Under 43 CFR 3111.2-2, a noncompetitive over-the-counter offer for acquired lands which includes a request for less than an entire tract of acquired land is, inter alia, required to describe the land by course and distance between the successive angle points of the boundary of the tract sought. Where such a

description is not provided, the offer affords no priority and is properly rejected by BLM.

Rust Properties, 93 IBLA 117 (July 28, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Zoe C. Schluter, 93 IBLA 338 (Sept. 11, 1986)

APPLICATIONS

Generally

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Angelo J. Speracino, 91 IBLA 265 (Apr. 9, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application

within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-8.

Bruce K. Yoshimura, 91 IBLA 273 (Apr. 11, 1986)

Where a first-drawn applicant for an oil and gas lease in the simultaneous leasing program fails to submit signed lease offers within 30 days of notice by BLM, the application is properly rejected.

Lawrence E. Welsh, Jr., 91 IBLA 328 (Apr. 17, 1986)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Semanko, 91 IBLA 348 (Apr. 22, 1986)

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

Gladys Walts, 91 IBLA 352 (Apr. 23, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

Ralph E. Peterson, 94 IBLA 380 (Nov. 26, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Carolyn J. McCutchin, 93 IBLA 134 (July 29, 1986)

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James R. Dodson, 94 IBLA 69 (Sept. 29, 1986)

APPLICATIONS--Continued

Generally--Continued

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 335 (Oct. 21, 1986)

Assignments

The Board will affirm a BLM decision rejecting a noncompetitive over-the-counter oil and gas lease offer for public domain lands where the lands cannot be embraced within a 6-mile-square area or an area not exceeding six surveyed sections in length and width, as required by 43 CFR 3110.1-3(b).

Donald J. Kunkle, Ingrid E. Kunkle, 94 IBLA 212 (Nov. 5, 1986)

Attorneys-in-Fact or Agents

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

BLM may properly reject a noncompetitive oil and gas lease offer signed by someone other than the offeror when it is not rendered in a manner to reveal the name of the signatory and the relationship between the offeror and signatory, in accordance with 43 CFR 3102.4. However, the BLM decision will be reversed where the evidence establishes that the offeror actually signed the offer form.

Ethel K. Braggs, 94 IBLA 68 (Sept. 29, 1986)

Description

Under 43 CFR 3111.2-2, a noncompetitive over-the-counter offer for acquired lands which includes a request for less than an entire tract of acquired land is, inter alia, required to describe the land by course and distance between the successive angle points of the boundary of the tract sought. Where such a description is not provided, the offer affords no priority and is properly rejected by BLM.

Bark Properties, 93 IBLA 117 (July 28, 1986)

APPLICATIONS--Continued

Drawings

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

R. K. Miller, 90 IBLA 378 (Feb. 27, 1986)

The Secretary has broad discretion to frame per se rules in administering the simultaneous oil and gas leasing program. Thus, an application that violates 43 CFR 3112.2-3 by failing to disclose any party or filing service which is in the business of providing assistance to participants in the program is properly rejected for violation of the regulation alone.

William Pegoy (On Reconsideration), 91 IBLA 191 (Mar. 31, 1986)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

RTA Oil Producers, 91 IBLA 268 (Apr. 11, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Bruce M. Yoshiyama, 91 IBLA 273 (Apr. 11, 1986)

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 186

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicant failed to submit separate remittances, in payment of the filing fees and first year's rentals with each Part B application.

Roger Georgescu, 91 IBLA 387 (Apr. 28, 1986)

APPLICATIONS--Continued

Drawings--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

Vincent Mortsan, 92 IBLA 67 (May 22, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers has not "formulated" the application within the meaning of 43 CFR 3112.2-4 or 43 CFR 3112.0-5.

Joseph E. Crowley, 92 IBLA 75 (May 23, 1986)

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicants failed to submit separate remittances, in payment of the filing fees and first year's rentals with each Part B application.

Thomas & Nancy Wieker, 92 IBLA 107 (May 30, 1986)

BLM may properly declare a simultaneous oil and gas lease application unacceptable and return the filing fee and first year's rental, minus a $75 processing fee, where the applicant failed to file the application timely with the Wyoming BLM State Office.

Merle E. Yontz, 93 IBLA 77 (July 16, 1986)

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Joel Yancey Wilson, 93 IBLA 101 (July 22, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

Carolyn J. McCutchin, 93 IBLA 138 (July 29, 1986)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Where a simultaneous oil and gas lease application has been included in a drawing and been accorded a priority, subsequently discovered mismatched Parts A and B identification numbers may not be used as a basis for finding the application to be unacceptable.

Edward P. Scholle, 93 IBLA 138 (July 30, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof, the land is determined to be within the known geologic structure of a producing oil or gas field.

Hrabetz Oil Co., 93 IBLA 383 (Sept. 11, 1986)

A simultaneous oil and gas application which is filled out, signed, dated, and submitted by the applicant is improperly rejected for failure to disclose filing service assistance notwithstanding the fact the check tendered for the filing fees is drawn by a firm which provided the applicant with parcel recommendations where the funds were advanced by the applicant.

Ann Erhardt, 94 IBLA 317 (Nov. 24, 1986)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

Kerogen Crushers, 95 IBLA 63 (Dec. 19, 1986)

Filing

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Janet P. Larson, 91 IBLA 151 (Mar. 25, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Angelo J. Speraccino, 91 IBLA 265 (Apr. 9, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application

APPLICATIONS--Continued

Filing--Continued

within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 186

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Buckstuhl, 91 IBLA 384 (Apr. 28, 1986)

BLM may not reject a simultaneous oil and gas lease application for failure to disclose the name of the entity which provided assistance to the applicant, pursuant to 43 CFR 3112.2-4, where the entity merely provided parcel recommendations and cannot be said to have "formulated" the application within the meaning of 43 CFR 3112.0-5.

Richard J. Lyons, 92 IBLA 58 (May 13, 1986)

Lawrence L. Krick, 92 IBLA 71 (May 22, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers has not "formulated" the application within the meaning of 43 CFR 3112.2-4 or 43 CFR 3112.0-5.

Joseph W. Crowley, 92 IBLA 75 (May 23, 1986)

Where a simultaneous oil and gas lease application has been included in a drawing and been accorded a priority, subsequently discovered mismatched Parts A and B identification numbers may not be used as a basis for finding the application to be unacceptable.

Edward P. Scholls, 93 IBLA 138 (July 30, 1986)

A simultaneous oil and gas application which is filled out, signed, dated, and submitted by the applicant is improperly rejected for failure to disclose filing service assistance notwithstanding the fact the check tendered for the filing fees is drawn by a firm which provided the applicant with parcel recommendations where the funds were advanced by the applicant.

Ann Erhardt, 94 IBLA 317 (Nov. 24, 1986)

APPLICATIONS--Continued

Six-mile Square Rule

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM properly rejects a noncompetitive oil and gas lease offer which does not comply with the requirements of 43 CFR 3110.1-3(b) that lands in an offer be entirely within an area of 6-miles square or within an area not exceeding six surveyed sections in length or width measured in cardinal directions.

W.O.I.L. Associates, 92 IBLA 312 (June 26, 1986)

When a description of lands sought in an offer to lease public lands for oil and gas cannot be embraced within a 6-mile square or within an area not exceeding six surveyed sections the offer is defective and must be rejected in its entirety, pursuant to 43 CFR 3110.1-3(b). 43 CFR 3110.1-3(b) specifically states that an offer shall describe lands within the designated area limitation.

Thomas J. Carmody, Anna S. Carmody, 94 IBLA 209 (Nov. 4, 1986)

The Board will affirm a BLM decision rejecting a noncompetitive over-the-counter oil and gas lease offer for public domain lands where the lands cannot be embraced within a 6-mile-square area or an area not exceeding six surveyed sections in length and width, as required by 43 CFR 3110.1-3(b).

Donald J. Kunkle, Ingrid M. Kunkle, 94 IBLA 212 (Nov. 5, 1986)

Sole Party in Interest

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1978), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

A filing service contract which includes a provision under which the filing service will sell its client's rights in oil and gas leases obtained by them is an agreement covering interests in oil and gas leases and itself constitutes an interest in oil and gas lease offers as defined at 43 CFR 3100.0-5(b) (1978).

A filing service contract which grants the filing service a percentage of the sales price and royalties due on any leases obtained by the client and sold by the filing service, gives the filing service a prospective or future claim to benefit from its client's leases and a right to share in the profits accrued from such leases as defined at 43 CFR 3100.0-5(b) (1978).

The regulatory definition of interests is not limited to the standard interests in oil and gas leases

APPLICATIONS--Continued

Sole Party in Interest--Continued

commonly recognized within the industry, but encompasses a broad range of methods of benefitting from a lease. It does not matter whether the benefit a filing service receives is enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. Nor does it matter that it might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers.

Raymond G. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 275 (June 25, 1986) 93 I.D. 258

ASSIGNMENTS OR TRANSFERS

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard M. Vinson et al., 90 IBLA 280 (Feb. 10, 1986)

Under 43 CFR 3108.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and the deficiency is nominal, the lease shall not automatically have terminated unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

An assignment of an oil and gas lease is ineffective until the proposed assignment has been approved by BLM. 30 U.S.C. § 187a (1982). Until such time as the assignment is approved, the party designated as the party responsible for payment of lease rentals on the lease to be assigned remains responsible for rental payments.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert D. Fleck, Carl J. Williams, William J. Medalie, 91 IBLA 187 (Mar. 31, 1986)

ASSIGNMENTS OR TRANSFERS--Continued

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental required for the lands described in the partial assignment prior to the anniversary date.

Ruth I. Schwoerer, 92 IBLA 98 (May 28, 1986)

Where the record titleholder of an oil and gas lease fails to request reinstatement within 60 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

BLM should properly suspend action on a request for approval of assignment if it has received notice that the power of the attorney in fact to act on behalf of the assignor has been revoked and the request is signed by the attorney in fact after such revocation. Where BLM has incorrectly approved such a request, it should revoke such approval and suspend action until the parties have resolved the dispute as to the validity of the assignment.

Jack W. Stahl et al., 93 IBLA 207 (Aug. 20, 1986)

A BLM decision requiring submission of a bond for an oil and gas lease prior to the approval of a transfer of the lease will be upheld where the transferee disputes the amount of the required bond but fails to establish error in BLM's determination, thereof.

Dallas Oil Co., 93 IBLA 218 (Aug. 28, 1986)

Where the description of lands included in an oil and gas lease assignment filed with BLM for approval is unclear and fails to conform to the lands described in the lease, neither BLM nor this Board is empowered to supply a description of the land to be conveyed by the proposed assignment, which is properly disapproved.

Donald & Barbara Schneider, 90 IBLA 84 (Sept. 30, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date. Where no rental is tendered timely either for the entire lease or for the acreage encraced in a pending unapproved assignment of record title, the lease is properly held to have terminated.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee

ASSIGNMENTS OR TRANSFERS--Continued

as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 30 U.S.C. § 188(c), (d), and (e) (1982).

Stanley I. Okun, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Where the unapproved assignee of a partial assignment of an oil and gas lease tenders, prior to the anniversary date of the lease, rental for that portion of the lease assigned to it, the lease as to that portion does not terminate, and a decision by BLM holding otherwise and returning the partial assignment unapproved will be reversed.

Russell Sinclair Grove, Jr., 94 IBLA 258 (Nov. 13, 1986)

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert E. Eileen Taylor, 94 IBLA 259 (Nov. 18, 1986)

BONDS

A BLM decision requiring submission of a bond for an oil and gas lease prior to the approval of a transfer of the lease will be upheld where the transferee disputes the amount of the required bond but fails to establish error in BLM's determination thereof.

Dallas Oil Co., 93 IBLA 218 (Aug. 20, 1986)

CANCELLATION

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

Inexco Oil Co., 93 IBLA 124 (July 29, 1986)

CIVIL ASSESSMENTS AND PENALTIES

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sohnut Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

CIVIL ASSESSMENTS AND PENALTIES--Continued

Where BLM issues notices of incidents of noncompliance to an oil and gas operator for failure to equip "appropriate valves" under 43 CFR 3162.7-4(a) and assesses the operator $250 per violation in accordance with 43 CFR 3163.1(j), and on appeal the operator establishes that, as applied to the operator's situation, the "appropriate valve" requirement is ambiguous, the violations and assessments will be overturned.

Anadarko Production Co., 91 IBLA 154 (Mar. 25, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.23 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986)
93 I.D. 159

Departmental regulation 43 CFR 3162.7-4(d)(1) (1984) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a $100 assessment under 43 CFR 3163.3(h) (1984). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Fuel Resources Development Co., 91 IBLA 242 (Apr. 8, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.1

An assessment levied pursuant to 43 CFR 3163.3(a) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. An assessment may be levied where compliance with an order or instruction is not achieved within the specified period regardless of the apparent gravity of the impact of the noncompliance.

When an oil and gas lease operator has failed to report an oil spillage as required by 43 CFR

3162.5-1(c) and has failed to respond to BLM instructions to report the amount of oil spilled in the monthly report of operations as required by 3162.4-3, these separate actions may be treated as separate incidents of noncompliance.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Yates Petroleum Corp., 91 IBLA 292 (Apr. 9, 1986)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve, as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(d) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Honeystone Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

A decision assessing liquidated damages pursuant to 43 CFR 3163.3(d) for an oil and gas lessee's failure to obtain approval before recompleting a well in a different interval will be reversed where the formation in which the well was recompleted has been determined by order of the state conservation commission to be part of a common pool embracing both the recompletion formation and the formation in which the well was initially completed.

Energy Reserves Group, Inc., 92 IBLA 219 (June 23, 1986)

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 25, 1986)

An assessment pursuant to 43 CFR 3163.3(d) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should be automatically levied.

Polack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

Where BLM issues an incident of noncompliance for failure of the transporter to "isolate the sales tank" during the "sales phase" and assesses the oil and gas lease operator $250 in accordance with 43 CFR 3163.3(j), and on appeal the record indicates the transporter had not transferred any oil or engaged in any activity which would violate the integrity of the storage system, the "sales phase" had not commenced and the violations and assessments will be overturned.

Petrogates Resources, Inc., 93 IBLA 165 (Aug. 12, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to timely file a notice of production start-up may be vacated by this Board, in view of the suspension of that regulation and a change in Departmental policy that such assessments should automatically be levied.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

An assessment for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h), may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should automatically be levied.

Falcon Oil Co., 94 IBLA 71 (Sept. 30, 1986)

BLM may properly issue a notice of incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations with respect to an oil and gas lease, where that document is not in the record and the presumption that BLM did not lose or misplace it has not been rebutted.

An assessment of liquidated damages for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Apollo Energy, Inc., 94 IBLA 154 (Oct. 23, 1986)

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits on a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the

CIVIL ASSESSMENTS AND PENALTIES--Continued

appellant fails to provide any countervailing evidence to show the decision is in error.

Ramco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)

An automatic assessment for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should automatically be levied.

Sprague Corp., 94 IBLA 264 (Nov. 17, 1986)

Automatic assessments for failure to file timely production reports pursuant to 43 CFR 3163.3(b) are vacated in deference to a later issued BLM Instruction Memorandum suspending enforcement of 43 CFR 3163.3(b).

Davis Oil Co., 94 IBLA 325 (Nov. 24, 1986)

An automatic assessment for failure to maintain effective seals pursuant to the regulation at 43 CFR 3163.3(j) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should be automatically levied.

Robert L. Bayless, 94 IBLA 335 (Nov. 26, 1986)

The BLM may properly cite an oil and gas lessee for an INC with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation and the change in Department policy that such assessments should be levied automatically.

Mingo Oil Producers, 94 IBLA 384 (Dec. 8, 1986)

COMMUNITIZATION AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Wexpro Co., 90 IBLA 394 (Feb. 28, 1986)

COMPENSATORY ROYALTY

BLM may properly provide for the assessment of compensatory royalty pursuant to 43 CFR 3162.2(a) where an oil and gas lessee fails to drill a well to protect the lessor from loss of royalty due to drainage, and the lessee has failed to demonstrate that the quantity

COMPENSATORY ROYALTY--Continued

of oil or gas underlying the lease which would be lost by drainage is not sufficient to pay the cost of drilling and operating the well at a reasonable profit.

When the record supports a conclusion that drainage is occurring, but also indicates BLM's intent to have a lessee pay compensatory royalties, regardless of whether or not a paying production well can be drilled, the decision will be vacated and the case remanded to BLM to provide appellant an opportunity to submit evidence that a prudent operator would not drill a protective well.

Gulf Oil Exploration & Production Co., 94 IBLA 364 (Dec. 8, 1986)

COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of $5 per acre was established by the advertised terms of sale, a bid for $1.39 was properly rejected.

John R. Pehrsson, 92 IBLA 68 (May 22, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, B. B. Allsup, 92 IBLA 197 (June 12, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krumbein, 92 IBLA 362 (June 30, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Read & Stevens, Inc., 93 IBLA 61 (July 15, 1986)

Read & Stevens, Inc., 93 IBLA 84 (July 16, 1986)

COMPETITIVE LEASES--Continued

Before issuance of a competitive oil and gas lease for land within the area of an approved unit agreement, it is proper to require the successful bidder to file evidence that it has entered into an agreement with the unit operator for development of the land in the lease under the terms and provisions of the approved unit agreement or to file a statement giving satisfactory reasons for failure to enter such agreement.

Where a high bidder for a competitive oil and gas lease within the area of an approved unit agreement fails to file evidence showing joinder to the unit agreement or to submit satisfactory reasons for failure to enter into agreement with the unit operator, it is proper to reject the bid and to refund the balance of the bonus bid and the first year's rental. However, where the bidder explains on appeal that it did make inquiry regarding joinder to the unit but received no response, and there are no intervening rights, the case may be remanded to BLM to allow the bidder additional time to submit proof of joinder.

Foteo Oil Co., 93 IBLA 131 (July 29, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A BLM decision rejecting a high bid in a competitive oil and gas lease sale as inadequate will be affirmed if the record indicates the decision has been made in a careful and systematic manner utilizing the advice of the experts employed by the Department for making such determinations. A showing of a rational basis for the conclusion that the highest bid does not represent fair market value is sufficient.

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lohrasp, 94 IBLA 34 (Sept. 25, 1986)

COMPETITIVE LEASES--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed in the absence of a showing of error.

The number of bids received at a sale of competitive oil and gas leases on any parcel does not necessarily represent an accurate test of fair market value, as bidders may consider other factors in making their bids.

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation and presents sufficient documentation supporting its valuation, the bidder must not only disprove the Government's fair market value estimates, but must also prove that his bid constitutes fair market value.

L. E. Foster, 94 IBLA 282 (Nov. 4, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Suzanne Walsh, 94 IBLA 240 (Nov. 13, 1986)

DISCOVERY

Although the statutory language in secs. 17(e) and 17(f) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Nike Poll Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable

fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krambein, 92 IBLA 362 (June 30, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Read & Stevens, Inc., 93 IBLA 61 (July 15, 1986)

Read & Stevens, Inc., 93 IBLA 88 (July 15, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A BLM decision rejecting a high bid in a competitive oil and gas lease sale as inadequate will be affirmed if the record indicates the decision has been made in a careful and systematic manner utilizing the advice of the experts employed by the Department for making such determinations. A showing of a rational basis for the conclusion that the highest bid does not represent fair market value is sufficient.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic

manner utilizing the advice of such experts, the decision will not be reversed in the absence of a showing of error.

L. E. Foster, 94 IBLA 282 (Nov. 6, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Suzanne Walsh, 94 IBLA 249 (Nov. 13, 1986)

DRAINAGE

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

BLM may properly provide for the assessment of compensatory royalty pursuant to 43 CFR 3162.2(a) where an oil and gas lessee fails to drill a well to protect the lessor from loss of royalty due to drainage, and the lessee has failed to demonstrate that the quantity of oil or gas underlying the lease which would be lost by drainage is not sufficient to pay the cost of drilling and operating the well at a reasonable profit.

When the record supports a conclusion that drainage is occurring, but also indicates BLM's intent to have a lessee pay compensatory royalties, regardless of whether or not a paying productive well can be drilled, the decision will be vacated and the case remanded to BLM to provide appellant an opportunity to submit evidence that a prudent operator would not drill a protective well.

Gulf Oil Exploration & Production Co., 94 IBLA 368 (Dec. 8, 1986)

EXPIRATION

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application

EXPIRATION--Continued

for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

Although the statutory language in secs. 17(e) and 17(f) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Mike Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

EXTENSIONS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the noncommitted lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the noncommitted lease.

Cobaco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Rexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(f) (1982), the segregated noncommitted lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986) 93 I.D. 246

Although the statutory language in secs. 17(e) and 17(f) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Mike Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

FIRST-QUALIFIED APPLICANT

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1978), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond G. Albrecht, Fred I. Fagle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

Where an over-the-counter lease offer is defective as filed, the offer receives no priority until the defect is cured.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

INCIDENTS OF NONCOMPLIANCE

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Sohnat Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

Departmental regulation 43 CFR 3162.7-4(d)(1) (1984) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a $100 assessment under 43 CFR 3163.3(h) (1984). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Fuel Resources Development Co., 91 IBLA 282 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby

INCIDENTS OF NONCOMPLIANCE--Continued

operating well is accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(5).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the application for Permit to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

KNOWN GEOLOGIC STRUCTURE

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Arney, 90 IBLA 375 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. W. Killion, 90 IBLA 378 (Feb. 27, 1986)

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Budde, 91 IBLA 182 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

KNOWN GEOLOGIC STRUCTURE--Continued

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during this interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Temmis, 91 IBLA 248 (Apr. 23, 1986)

One who challenges a determination by the Bureau of Land Management that land is within the known geological structure of a producing oil or gas field has the burden of showing the determination is in error.

Gladys Wells, 91 IBLA 252 (Apr. 23, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Buchsbaum, 91 IBLA 384 (Apr. 28, 1986)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that the land is within a section transected by the 20-foot isopach of a productive formation and the lessee fails to present a preponderance of evidence to the contrary.

J. A. Nanek dba Nanek Oil Co., Barbara P. Sweeney, 92 IBLA 12 (May 6, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Jose Vasquez Vilaso, 93 IBLA 181 (July 23, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Carolyn J. McCutchin, 93 IBLA 178 (July 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer where the land has been determined to be within a known geologic structure of a producing oil or gas field after the simultaneous oil and gas lease drawing but prior to issuance of a lease.

Mark L. Stephens, 93 IBLA 287 (Sept. 3, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof, the land is determined to be within the known geologic structure of a producing oil or gas field.

Wrubusty Oil Co., 93 IBLA 387 (Sept. 11, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.2(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lohrasp, 94 IBLA 39 (Sept. 25, 1986)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 13 (Oct. 21, 1986)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

A decision of BLM delineating the boundaries of a known geologic structure of a producing oil and gas field will be affirmed where, based on the stratigraphic nature of the hydrocarbon accumulations, BLM draws the exterior boundaries on the basis of the zero-net-effective reservoir isopach of a producing formation.

BLM Instruction Memoranda and Manual provisions do not generally have the force and effect of law.

Pamela S. Crocker-Davis, 94 IBLA 328 (Nov. 24, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Ralph E. Peterson, 94 IBLA 340 (Nov. 26, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Designation of land as situated within a known geologic structure of a producing oil or gas field will be sustained on appeal where there is a reasonable probability the land is underlain by at least one sandstone body in a particular formation which has been determined to be productive in that area, and appellant fails to establish by a preponderance of the evidence that the designation is in error.

Wally J. Picou, 95 IBLA 98 (Dec. 31, 1986)

LANDS SUBJECT TO

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

Daniel C. Wychgram, 92 IBLA 18 (May 6, 1986)

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard H. Clark, 92 IBLA 353 (June 30, 1986)

LANDS SUBJECT TO--Continued

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

Inexco Oil Co., 93 IBLA 129 (July 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Ina C. Schlater, 93 IBLA 319 (Sept. 11, 1986)

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James M. Dodson, 94 IBLA 69 (Sept. 29, 1986)

NONCOMPETITIVE LEASES

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Abney, 90 IBLA 375 (Feb. 27, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

R. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James M. Chudnow, 91 IBLA 143 (Mar. 24, 1986)

NONCOMPETITIVE LEASES--Continued

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Bodie, 91 IBLA 162 (Mar. 24, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Sensabaugh, 91 IBLA 348 (Apr. 22, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Puckstuhl, 91 IBLA 384 (Apr. 29, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Joel Yancey Wilson, 93 IBLA 101 (July 22, 1986)

NONCOMPETITIVE LEASES--Continued

A defect in a noncompetitive oil and gas lease offer may, in the case of over-the-counter offers to lease, be curable. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, no curative submissions will be received by the Board of Land Appeals to reinstate lease offers which have correctly been rejected by BLM because of the deficiencies.

Mark Properties, 93 IBLA 117 (July 28, 1986)

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

Ipesco Oil Co., 93 IBLA 170 (July 29, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Carolyn A. McCutchin, 93 IBLA 174 (July 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer where the land has been determined to be within a known geologic structure of a producing oil or gas field after the simultaneous oil and gas lease drawing but prior to issuance of a lease.

Mark A. Stephens, 93 IBLA 287 (Sept. 3, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Zoe C. Schluter, 93 IBLA 314 (Sept. 11, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof, the land is determined to be within the known geologic structure of a producing oil or gas field.

Brubetz Oil Co., 93 IBLA 343 (Sept. 11, 1986)

Where an over-the-counter lease offer is defective as filed, the offer receives no priority until the defect is cured.

Ipesco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

NONCOMPETITIVE LEASES--Continued

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.2-1(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lohkamp, 94 IBLA 34 (Sept. 24, 1986)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 135 (Oct. 21, 1986)

A defect in an over-the-counter noncompetitive oil and gas lease offer may be cured prior to rejection. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, after BLM has rejected an offer because of deficiencies, no curative submissions will be accepted.

Thomas J. Carmody, Anna F. Carmody, 94 IBLA 239 (Nov. 4, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Ralph F. Peterson, 94 IBLA 380 (Nov. 26, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Wally J. Pippy, 95 IBLA 98 (Dec. 31, 1986)

OFFERS TO LEASE

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

A noncompetitive lease offer must be rejected by the Bureau of Land Management whenever it is determined

the land for which the offer is made is within a known geological structure.

Gladys Walta, 91 IBLA 382 (Apr. 23, 1986)

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond G. Albrecht, Fred L. Engle d/b/a Pegasus Service Co., 92 IBLA 295 (June 24, 1986) 93 I.D. 250

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard M. Clark, 92 IBLA 353 (June 30, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 90 IBLA 98 (Sept. 25, 1986)

BLM may properly reject a noncompetitive oil and gas lease offer signed by someone other than the offeror when it is not rendered in a manner to reveal the name of the signatory and the relationship between the offeror and signatory, in accordance with 43 CFR 3102.5. However, the BLM decision will be reversed where the evidence establishes that the offeror actually signed the offer forms.

Ethel V. Brandt, 90 IBLA 68 (Sept. 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Wally J. Picon, 95 IBLA 98 (Dec. 31, 1986)

PATENTED OR ENTERED LANDS

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James R. Dodson, 90 IBLA 69 (Sept. 29, 1986)

PROTECTION

Although the statutory language in secs. 17(m) and 17(t) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Pike Pell Mining & Oil Co., 91 IBLA 143 (July 30, 1986)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucas Pabst, 90 IBLA 182 (Jan. 23, 1986)

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard E. Vinson et al., 90 IBLA 280 (Feb. 13, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 349 (Feb. 26, 1986)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Wayne J. Stanley, 90 IBLA 357 (Feb. 27, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable

diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

PEP Exploration Co., 91 IBLA 165 (Mar. 24, 1986)

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert D. Fleck, Carl J. Williams, William I. Tedalis, 91 IBLA 187 (Mar. 31, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert J. Stippett, Lois C. Stippett, 91 IBLA 239 (Apr. 8, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 301 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 398 (Apr. 29, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after

it was sent to the lessee's last address of record, and expires 60 days later.

Where the record titleholder of an oil and gas lease fails to request reinstatement within 60 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Failing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ann L. Rose, 92 IBLA 308 (June 26, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edward P. Finch, 92 IBLA 330 (June 30, 1986)

Congress has enacted two provisions for reinstating a noncompetitive oil and gas lease which has automatically terminated by operation of law pursuant to 30 U.S.C. § 188(b) (1982) for failure to pay the rental timely. In order to qualify for Class I reinstatement under 30 U.S.C. § 188(c) (1982), the rental must be tendered within 20 days of the anniversary date and the lessee must establish that failure to pay on time was either justifiable or not due to a lack of reasonable diligence. If failure to make timely payment was inadvertent, the lease may be eligible only for a Class II reinstatement pursuant to 30 U.S.C. § 188(d) (1982). A lessee who was unaware that his lease would terminate if he did not mail his payment before the anniversary date has neither acted with reasonable diligence nor established that his failure to make timely payment was justifiable.

Dominic D. Denicco, 92 IBLA 378 (July 8, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to

REINSTATEMENT--Continued

30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is now justifiable where the rental payment was returned by the U.S. Postal Service as undeliverable because the address on the envelope was unreadable. Appellant must bear the consequences of the Postal Service's inability to timely deliver the rental payment.

Mailing the rental payment after the anniversary date does not constitute reasonable diligence.

Neal Hunter, 93 IBLA 80 (July 16, 1986)

A lease automatically terminated by operation of law pursuant to 30 U.S.C. § 188(b) (1982) may be reinstated pursuant to 30 U.S.C. § 188(c) if the lease rental has been paid within 20 days of the lease's anniversary date and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Inability to pay is not, in itself, a justifiable reason for failing to make timely payment.

Paul J. & Lyda R. Stivers, 93 IBLA 97 (July 22, 1986)

A petition for reinstatement of noncompetitive oil and gas leases filed pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payments were mailed to BLM after the lease anniversary dates and the illness asserted as justification for late payments is not substantiated as being the proximate cause of the late payments.

Larregore Petroleum Partnership, 94 IBLA 30 (Sept. 25, 1986)

Where a federal oil and gas lessee fails to submit payment of annual rental within 20 days following the anniversary date of her lease, the Department lacks authority pursuant to 30 U.S.C. § 188(c) (1982), to reinstate her oil and gas lease which was terminated by operation of law for her failure to timely pay rental on or before the anniversary date of the lease.

Anna Reitman, 94 IBLA 148 (Oct. 21, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow

REINSTATEMENT--Continued

the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Gerald A. Peters, 94 IBLA 152 (Oct. 23, 1986)

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 30 U.S.C. § 188(c), (d), and (e) (1982).

Stanley I. Olan, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert E. Filson Taylor, 94 IBLA 259 (Nov. 14, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 348 (Nov. 26, 1986)

RENTALS

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 10 days of receipt of notice to do so, the application is properly rejected.

Janet R. Larson, 91 IBLA 171 (Mar. 25, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

RENTALS--Continued

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3101.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

J. A. Yanek dba Yanek Oil Co., Barbara F. Sweeney, 92 IBLA 17 (May 6, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 170 (Oct. 23, 1986)

ROYALTIES

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)
93 I.D. 6

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required * * * by applicable law" under 43 U.S.C. § 1734(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986)
93 I.D. 285

ROYALTIES--Continued

Where a decision to assess royalty on vented natural gas fails to specify the extent of the lessee's liability and indicates it will be followed by a specific billing for the amount assessed, it is not a "final" appealable decision and a timely appeal from the billing will preserve the issue of the extent of the liability for vented gas.

F. Howard Walsh, Jr., Sue Lamar Davis & Newton Lamar, 93 IBLA 297 (Sept. 9, 1986)

The Minerals Management Service (MMS) is authorized to issue royalty value determination letters, which will be binding on the Department and the lessee unless and until rescinded or modified by MMS. A royalty value determination letter properly issued by MMS cannot be interpreted in a manner which would result in the delegation of authority for determination of royalty amounts to a lessee. Such a letter must establish the basis for determination in sufficiently specific language to permit the exact basis for determination, and cannot bind the Department to a royalty rate merely because that rate has been approved by the Federal Power Commission.

Amoco Production Co. (On Reconsideration), 94 IBLA 129 (Oct. 9, 1986)

STIPULATIONS

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James M. Chudnow, 91 IBLA 183 (Mar. 28, 1986)

SUSPENSIONS

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

SUSPENSIONS--Continued

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Inexco Production Co., et al., 92 IBLA 333 (June 30, 1986)

When an oil and gas lease of lands located within a wilderness study area is issued after enactment of the Federal Land Policy and Management Act of 1976, subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability, and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, the denial is not a restriction tantamount to a suspension under 30 U.S.C. § 209 (1982).

Beartooth Oil & Gas Co., 94 IBLA 115 (Oct. 9, 1986)

TERMINATION

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Lucas Robert, 90 IBLA 187 (Jan. 23, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 349 (Feb. 26, 1986)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Wayne J. Stastny, 90 IBLA 357 (Feb. 27, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable

TERMINATION--Continued

diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

Under 43 CFR 3104.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and the deficiency is minimal, the lease shall not automatically have terminated unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

TXO Exploration Co., 91 IBLA 164 (Mar. 26, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

Albert D. Fleck, Carl J. Williams, William L. Sedalia, 91 IBLA 187 (Mar. 31, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert J. Stippett, Lois C. Stippett, 91 IBLA 239 (Apr. 8, 1986)

Where an oil and gas lessee's annual rental payment was postmarked on the Monday following the anniversary date of the lease which fell on the preceding Sunday, the payment was not timely under the provisions of 43 CFR 3108.2-1(a), even though, under the regulation, the lease payment could have been timely received by BLM on the Monday upon which payment was postmarked. Mailing was not made the equivalent of actual payment nor was the anniversary date of the lease changed by the regulation, which permits payment on the next day following a lease anniversary when the office where payment is to be made is closed on the anniversary date.

Nancy Wohl, 91 IBLA 327 (Apr. 17, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of $5 per acre as well as reimbursement of administrative costs (up to $500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 398 (Apr. 29, 1986)

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental required for the lands described in the partial assignment prior to the anniversary date.

Ruth L. Schaperer, 92 IBLA 98 (May 28, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ada L. Rose, 92 IBLA 308 (June 26, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edward E. Finch, 92 IBLA 330 (June 30, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the rental payment was returned by the U.S. Postal Service as undeliverable because the address on the envelope was unreadable. Appellant must bear the consequences of the Postal Service's inability to timely deliver the rental payment

Mailing the rental payment after the anniversary date does not constitute reasonable diligence.

Neal Hunter, 93 IBLA 80 (July 16, 1986)

Although the statutory language in secs. 17(e) and 17(f) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Mike Bell Mining & Oil Co., et al., 93 IBLA 183 (July 30, 1986)

A petition for reinstatement of noncompetitive oil and gas lessee filed pursuant to sec. 31(c) of the Mineral Leasing Act, As Amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payments were mailed to BLM after the lease anniversary dates and the illness asserted as justification for late payments is not substantiated as being the proximate cause of the late payments.

Larrymore Petroleum Partnership, 94 IBLA 30 (Sept. 25, 1986)

Where a federal oil and gas lessee fails to submit payment of annual rental within 20 days following the anniversary date of her lease, the Department lacks authority pursuant to 30 U.S.C. § 188(c) (1982), to reinstate her oil and gas lease which was terminated by operation of law for her failure to timely pay rental on or before the anniversary date of the lease.

Anna Beltran, 94 IBLA 148 (Oct. 21, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date. Where no rental is tendered timely either for the entire lease or for the acreage embraced in a pending unapproved assignment of record title, the lease is properly held to have terminated.

Stanley I. Okun, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert F. Pilcop Taylor, 94 IBLA 259 (Nov 14, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 384 (Nov. 26, 1986)

UNIT AND COOPERATIVE AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Kerr-McGee Corp., 90 IBLA 394 (Feb. 28, 1986)

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 86 (May 9, 1986)

UNIT AND COOPERATIVE AGREEMENTS--Continued

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(j) (1982), the segregated noncommitted lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986)
93 I.D. 244

Before issuance of a competitive oil and gas lease for land within the area of an approved unit agreement, it is proper to require the successful bidder to file evidence that it has entered into an agreement with the unit operator for development of the land in the lease under the terms and provisions of the approved unit agreement or to file a statement giving satisfactory reasons for failure to enter such agreement.

Where a high bidder for a competitive oil and gas lease within the area of an approved unit agreement fails to file evidence showing joinder to the unit agreement or to submit satisfactory reasons for failure to enter into agreement with the unit operator, it is proper to reject the bid and to refund the balance of the bonus bid and the first year's rental. However, where the bidder explains on appeal that it did make inquiry regarding joinder to the unit but received no response, and there are no intervening rights, the case may be remanded to BLM to allow the bidder additional time to submit proof of joinder.

Rodeo Oil Co., 93 IBLA 111 (July 29, 1986)

Although the statutory language in secs. 17(m) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Niko Bell Mining & Oil Co., et al., 93 IBLA 141 (July 30, 1986)

OUTER CONTINENTAL SHELF LANDS ACT

GENERALLY

The Department may begin presale procedures for a lease sale before the approval of the 5-year schedule on which it is listed.

Whether the Department May Issue a Call for Information & Nominations for Outer Continental Shelf Lease Sale 91, M-36958 (Feb. 10, 1986) 93 I.D. 125

OIL AND GAS LEASES

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however,

OIL AND GAS LEASES--Continued

unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

The Minerals Management Service (MMS) is authorized to issue royalty value determination letters, which will be binding on the Department and the lessee unless and until rescinded or modified by MMS. A royalty value determination letter properly issued by MMS cannot be interpreted in a manner which would result in the delegation of authority for determination of royalty amounts to a lessee. Such a letter must establish the basis for determination in sufficiently specific language to permit the exact basis for determination, and cannot bind the Department to a royalty rate merely because that rate has been approved by the Federal Power Commission.

Amoco Production Co. (On Reconsideration), 90 IBLA 129 (Oct. 9, 1986)

STATE LAWS

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

OUTER CONTINENTAL SHELF LANDS ACT--Continued

UNIT PLANS

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

PATENTS OF PUBLIC LANDS

CORRECTIONS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Minton, Marylee Minton, 91 IBLA 108 (Mar. 14, 1986)

EFFECT

Applications for lands to which the title has passed by issuance of a legal patent must be rejected.

R. J. & Norma Jean Bowman et al., 92 IBLA 314 (June 26, 1986)

EFFECT--Continued

The effect of an interim conveyance is to convey legal title from the United States. Applications for lands to which the United States no longer holds title must be rejected.

Dale S. Mrs. Doggett et al., 92 IBLA 316 (June 26, 1986)

RESERVATIONS

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)
93 I.D. 66

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986)
93 I.D. 179

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

SUITS TO CANCEL

The Department is barred from initiating action to vacate and annul a patent of public lands 6 years after the date of issuance of the patent, unless the patent was procured by fraud.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

SUITS TO CANCEL--Continued

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

PAYMENTS

GENERALLY

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)
93 I.D. 95

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

PRIVATE EXCHANGES

GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchange, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

EQUAL VALUES

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), states that the values of lands exchanged by the Secretary under the Act either shall be equal, or if not equal, should be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its

PROTESTS--Continued

denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

PUBLIC INTEREST

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Mendibourne Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or any interests therein if the public interest will be well served by such exchange.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

PUBLIC LANDS

ADMINISTRATION

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 394

ALASKA

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

SPECIAL USE PERMITS

The issuance of a special recreation use permit for the 1986 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yucca Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 17, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

PUBLIC SALES

GENERALLY

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

Where the regulations in 43 CFR 2711.1-2(a) governing a notice of realty action for public sale require that a notice identifying a tract for sale be sent to parties in interest by BLM 60 days prior to the sale, and provide for a 45-day comment period, a notice not timely sent to an interested party will not negate the sale where the party asserting the deficiency had actual notice of the sale, had an opportunity to comment and participate in the sale, and was not prejudiced by BLM's failure to provide a timely notice.

Richard D. & Virginia Troop, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. To the extent, however, that the method of sale or the procedures used in conducting the sale are challenged, such matters are properly subject to appeal under 43 CFR 4.410.

George Schultz, 90 IBLA 173 (Oct. 29, 1986)

APPLICATIONS

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

PREFERENCE RIGHTS

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

Under sec. 209(f) of FLPMA, 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which adequately accommodates the preference rights of the adjacent landowners where they all have an equal opportunity to submit sealed bids for a small parcel that does not lend itself to a division among the adjoining landowners and the record does not support a direct sale to any one of the preference bidders.

Richard D. & Virginia Troop, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

RAILROAD GRANT LANDS

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

RECLAMATION HOMESTEADS

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

Hylda Knutson, 90 IBLA 310 (Feb. 28, 1986)

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for

imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

George R. Hasser et al., 95 IBLA 105 (Dec. 31, 1986)

REGIONAL CORPORATION SELECTIONS

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice F. DePew, 91 IBLA 317 (Apr. 15, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

REGULATIONS

GENERALLY

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 68 (Feb. 24, 1986) 93 I.D. 79

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Sohio Oil Co., Inc., 91 IBLA 137 (Mar. 28, 1986)

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

David Schappy, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 100 (Apr. 8, 1986) 93 I.D. 176

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(f) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(b) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

REGULATIONS--Continued

GENERALLY--Continued

An assessment of liquidated damages for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(b) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Apollo Energy Inc., 94 IBLA 154 (Oct. 23, 1986)

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 13 IBIA 28 93 I.D. 409 (Oct. 28, 1986)

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits on a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the appellant fails to provide any countervailing evidence to show the decision is in error.

Mapco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(f) may be vacated by this Board in view of the suspension of that regulation and the change in Department policy that such assessments should be levied automatically.

Bingo Oil Producers, 94 IBLA 384 (Dec. 8, 1986)

APPLICABILITY

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 668d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

When the only reasonable construction of 43 CFR 3162.3-2(a), as evidenced by prior regulations, the rule-making process, and other regulations, is that "water shut-off" is a subsequent well operation requiring prior approval, an operator under an oil and gas lease cannot rely on the mispunctuation of the regulation as an ambiguity which can excuse failure to obtain approval prior to commencing with water shut-off activities.

Bolack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

REGULATIONS--Continued

FORCE AND EFFECT OF LAW

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Chugach Alaska Corp., The Groups Creek Corp., 94 IBLA 3, (Sept. 25, 1986)

BLM Instruction Memoranda and Manual provisions do not generally have the force and effect of law.

Pamela S. Crocker-Davis, 94 IBLA 338 (Nov. 24, 1986)

INTERPRETATION

It is axiomatic that the Bureau of Indian Affairs has a responsibility to interpret Federal regulations in carrying out its duties under those regulations.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 13 IBIA 28 93 I.D. 409 (Oct. 28, 1986)

PUBLICATION

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

VALIDITY

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Chugach Alaska Corp., The Groups Creek Corp., 94 IBLA 24 (Sept. 25, 1986)

WAIVER

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley H. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 249 (Sept. 2, 1986)

RENT

A determination establishing quarters rental rates which reflect reasonable rental value consistent with rates charged for comparable private housing in the surrounding community will be affirmed where the record shows the determination was made in accordance with accepted appraisal procedures pursuant to Departmental directives, and the quarters occupants have not established error in the determination.

Appeal of Patrick B. Borringer, Benson J. Pasiagis, Samuel L. Paul, & Robert Leonard, 7 OHA 8 (Oct. 2, 1986)

RES JUDICATA

Where a contractor had the opportunity to include in previous appeals to the Board a challenge to the validity of retainage of funds by the contracting officer, but failed to do so, the Board holds the current appeal, challenging the validity of retainage of funds by the contracting officer under the same contract, to be subject to dismissal under the doctrine of res judicata.

Appeal of C. G. Norton Co., Inc., IBCA-2068 (June 24, 1986) 93 I.D. 258

Where appellant failed to appeal from a 1982 Departmental decision establishing the date of priority of its noncompetitive oil and gas lease offer and acquiesced in the 1982 decision until 1985, it may not reopen the 1982 decision for the reason that it had failed to understand the consequence of the decision could be adverse.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

RIGHTS-OF-WAY

GENERALLY

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

Edward A. Nicholi, 93 IBLA 279 (Feb. 5, 1986)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Poering, 91 IBLA 131 (Mar. 20, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 4, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jancor, Inc., 93 IBLA 310 (Sept. 11, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barber, 94 IBLA 67 (Sept. 29, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may generally be rebutted only by another appraisal.

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

ACT OF FEBRUARY 25, 1920

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 8, 1986)

APPLICATIONS

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth H. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, Jr., 94 IBLA 138 (Oct. 21, 1986)

APPLICATIONS--Continued

Use of public lands for the purpose of conducting military maneuvers is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982).

Dept. of the Army, 95 IBLA 92 (Dec. 19, 1986)

APPRAISALS

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility" - A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 87 (Mar. 11, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barbee, 94 IBLA 67 (Sept. 29, 1986)

CONDITIONS AND LIMITATIONS

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Mt. Spokane, 91 IBLA 171 (Mar. 20, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barber, 90 IBLA 67 (Sept. 29, 1986)

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, JR., 90 IBLA 138 (Oct. 21, 1986)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 90 IBLA 167 (Oct. 28, 1986)

OIL AND GAS PIPELINES

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 90 IBLA 306 (Nov. 18, 1986)

REVISED STATUTES SEC. 2477

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Bossist, 90 IBLA 168 (Jan. 8, 1986)

RULES OF PRACTICE

GENERALLY

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

D. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Barry, 92 IBLA 271 (June 25, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG May 1983, 90 IBLA 22 (Sept. 23, 1986)

APPEALS

Generally

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1601 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG Bay 1983, 94 IBLA 27 (Sept. 23, 1986)

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. An order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 218 (Nov. 5, 1986)

Burden of Proof

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was

allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. E. Hemi Corp., IBCA-1923 (Feb. 27, 1986)
93 I.D. 92

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

United States v. Elmer M. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 16, 1986) 93 I.D. 289

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher International, Inc., 93 IBLA 48 (July 15, 1986)

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Nenana Cha-ag Native Corp., Trowell Nelson, 93 IBLA 250 (Nov. 7?, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 341 (Sept. 18, 1986)

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

The standard of proof requirement to be applied in Native allotment cases is the preponderance of evidence

standard, rather than the previously utilized standard of clear and credible evidence.

United States v. Estate of Gaston B. Petshenok, Ada J. Petshenok, Leland F. Petshenok, 94 IBLA 38 (Sept. 25, 1986)

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Add-Ventures, Ltd., 95 IBLA 88 (Dec. 29, 1986)

Dismissal

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Bouziat, 90 IBLA 168 (Jan. 8, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Pelutka, Inc., 90 IBLA 196 (Jan. 30, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 226 (June 24, 1986)

Andre C. Capella, 94 IBLA 181 (Oct. 25, 1986)

APPEALS--Continued

Dismissal--Continued

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

R. L. & Norma Jean Keenan et al., 92 IBLA 314 (June 26, 1986)

An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 345, 93 I.D. 287 (July 1, 1986)

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to adjoining landowners who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 93 IBLA 155 (July 31, 1986)

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 16(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(b)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

An appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an order of this Board requiring a showing of cause why the appeal should not be dismissed.

Venida Chuggy Native Corp., Trygvil Hebert, 93 IBLA 258 (Aug. 26, 1986)

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Altman, 93 IBLA 265 (Aug. 28, 1986)

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

T. Howard Ralph, Jr., The Lamar Davis & Hester Lamar, 93 IBLA 287 (Sept. 9, 1986)

APPEALS--Continued

Dismissal--Continued

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Don G. Carpenter, 94 IBLA 7 (Sept. 18, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

TCG War 1983, 94 IBLA 22 (Sept. 23, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeClaire, 94 IBLA 36 (Dec. 12, 1986)

Effect of

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

The process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 199 (Jan. 30, 1986)

APPEALS--Continued

Effect of--Continued

The regulation at 30 CFR 241.2 provides that decisions requiring payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 334 (Jan. 30, 1986)
93 I.D. 6

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

R. K. Tillion, 90 IBLA 378 (Feb. 27, 1986)

Failure to Appeal

Where appellant failed to appeal from a 1982 departmental decision establishing the date of priority of its noncompetitive oil and gas lease offer and acquiesced in the 1982 decision until 1985, it may not reopen the 1982 decision for the reason that it had failed to understand the consequence of the decision could be adverse.

Ramco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

The failure to file a timely appeal from a decision approving an interim conveyance of land to a Native corporation precludes a later appeal as to that land. Such an appeal must be dismissed.

City of Klawock, 90 IBLA 187 (Oct. 7, 1986)

Hearings

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

APPEALS--Continued

Hearings--Continued

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allottee applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 240 (June 30, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Klachquina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as unrebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 385 (Sept. 15, 1986)

Notice of Appeal

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed

Phlutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is

actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 24, 1986)

Reconsideration

The Board of Indian Appeals will not consider an issue in a petition for reconsideration which was not timely raised and considered below.

Norman S. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 271 (Sept. 30, 1986)

Standing to Appeal

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene E. Witt, 90 IBLA 265 (Jan. 31, 1986)

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene E. Witt, 90 IBLA 338 (Feb. 24, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 174 (Mar. 19, 1986)

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Kenneth M. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to oil-and-gas lessees who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 91 IBLA 155 (July 31, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Mischanina Shapovanova Ana'o et al., 91 IBLA 169 (Aug. 15, 1986)

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Altman, 91 IBLA 265 (Aug. 28, 1986)

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

Franklin Coal Estate Co., 91 IBLA 277 (Aug. 29, 1986)

A "protest" under the provisions of 43 CFR 4.450-2 only lies where an individual objects to actions which are "proposed to be taken in any proceeding before" BLM. Absent such conditions, an objection by an individual does not necessarily establish that he or she is a "party to the case" within the meaning of 43 CFR 4.410 for the purposes of establishing standing to appeal.

In order for an individual to establish standing to appeal under 43 CFR 4.410, the individual must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. To the extent, however, that the manner of sale or the procedures used in conducting the sale are challenged, such matters are properly subject to appeal under 43 CFR 4.410.

George Schultz, 90 IBLA 177 (Mar. 24, 1986)

Statement of Reasons

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 236 (June 26, 1986)

Arthur C. Capella, 96 IBLA 181 (Oct. 29, 1986)

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons is appropriate circumstances.

Ouzinkie Chenega Native Corp., Trowell Robert, 93 IBLA 258 (Nov. 24, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Don G. Carpenter, 96 IBLA 7 (Sept. 18, 1986)

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Ada Ventures, Ltd., 95 IBLA 93 (Dec. 19, 1986)

Timely Filing

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 177 (Jan. 31, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Tolutex, Inc., 90 IBLA 196 (Jan. 30, 1986)

Timely Filing--Continued

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

E. J. & Bonna Jean Bowman et al., 92 IBLA 314 (June 24, 1986)

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 10(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(b)(7) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Subsurface Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons is appropriate circumstances.

Ouzinkie Chenega Native Corp., Trowell Robert, 93 IBLA 258 (Nov. 24, 1986)

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

Where a decision to assess royalty on vented natural gas fails to specify the extent of the lessee's liability and indicates it will be followed by a specific billing for the amount assessed, it is not a "final" appealable decision and a timely appeal from the billing will preserve the issue of the extent of the liability for vented gas.

F. Howard Walsh, Jr., Sue Lapar Davis & Newton Lapar, 93 IBLA 297 (Sept. 9, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

TCG Way 1981, 93 IBLA 22 (Sept. 23, 1986)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date

APPEALS--Continued

Timely Filing--Continued

of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 96 IBLA 387 (Nov. 20, 1986)

EVIDENCE

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Monsanto Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

HEARINGS

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 24, 1986)

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

PRIVATE CONTESTS

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board

Sandra Bennett (On Reconsideration), 93 IBLA 113 (July 24, 1986)

PROTESTS

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest

Randall J. Gerlach, 90 IBLA 338 (Feb. 24, 1986)

A "protest" under the provisions of 43 CFR 4.450-2 only lies where an individual objects to actions which are "proposed to be taken in any proceeding before" BLM. Absent such conditions, an objection by an individual does not necessarily establish that he or she is a "party to the case" within the meaning of 43 CFR 4.410 for the purposes of establishing standing to appeal.

George Schultz, 90 IBLA 173 (Oct. 29, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claim will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and that issue as appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the

DISMISSAL--Continued

entire of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LaFaivre, 95 IBLA 26 (Dec. 17, 1986)

SECRETARY OF THE INTERIOR

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)
93 I.D. 398

SEGREGATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2477.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Hildebach, 90 IBLA 319 (Feb. 25, 1986)

Segregation of lands from appropriation under the Native Allotment Act by a proposed multiple-use management classification does not bar completion of the required 5-years' use and occupancy where such use and occupancy has commenced prior to the segregation.

United States v. Estate of George D. Patabrook, John J. Patabrook, Leland R. Patabrook, 94 IBLA 38 (Sept. 25, 1986)

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Klawock, 90 IBLA 107 (Oct. 7, 1986)

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency

SEGREGATION--Continued

of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 17, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lamar F. Christian, Deceased, 93 IBLA 378 (Dec. 4, 1986)

SMALL TRACT ACT

CLASSIFICATION

Lands classified as available for lease or sale under the Small Tract Act are segregated from all appropriation under the public land laws, including the mining laws, and mineral locations made on such lands are null and void ab initio.

Lands segregated from mineral location by classification under the Small Tract Act remain segregated until administrative action is taken to remove the classification.

Thom Seal et al., 94 IBLA 9 (Apr. 30, 1986)

SODIUM LEASES AND PERMITS

LEASES

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

PERMITS

A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date

Steve Dwyer, 93 IBLA 283 (Aug. 29, 1986)

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

RENTALS

A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.3-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date.

Steve Dwyer, 93 IBLA 293 (Aug. 29, 1986)

SPECIAL USE PERMITS

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Permit privileges may be canceled if a permittee has failed to satisfy minimum use requirements set forth in the provisions of the permit.

Dog Watch River Expeditions, 91 IBLA 291 (Apr. 15, 1986)

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Mondoo River 2 Trails, 91 IBLA 296 (Apr. 15, 1986)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 193 (July 23, 1986)

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled.

Peak River Expeditions, 90 IBLA 98 (Oct. 1, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Tigler River Rafting, Inc., 91 IBLA 98 (Dec. 29, 1986)

STATE LAWS

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

Fletcher Dy Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

STATE SELECTIONS

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Mayes Corp., 90 IBLA 167 (Jan. 8, 1986)

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alaska Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

STATUTES

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 387 (Feb. 26, 1986)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Bard Petroleum Corp., 93 IBLA 247 (Aug. 29, 1986)

STATUTORY CONSTRUCTION

GENERALLY

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-19 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-19(b) (1982), providing that BIM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

STOCK-RAISING HOMESTEADS

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Turner Rock & Paving Co., 91 IBLA 238 (Apr. 14, 1986)
93 I.D. 179

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ABATEMENT

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

ADMINISTRATIVE PROCEDURE

Generally

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

A document styled as an "application for review" filed within 30 days of receipt of a proposed assessment of a civil penalty will not be considered an application for review of a notice of violation or cessation order where the record shows the person filing the document was served with the notice of violation or cessation order more than 30 days prior to the filing; however, the document may be considered to be a petition for review of a proposed civil penalty.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement; Darryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 371 (July 1, 1986)

When an operator has made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and when that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which conforms with the requirements of 31 U.S.C. § 3716 (1982).

McWane Coal Co., Inc., 95 IBLA 1 (Dec. 11, 1986)
93 I.D. 469

Burden of Proof

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is unrebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 198 (Aug. 15, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPROXIMATE ORIGINAL CONTOUR

Generally

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, and neither that Act nor these regulations provide authority for an evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

BACKFILLING AND GRADING REQUIREMENTS

Highwall Elimination

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, and neither that Act nor those regulations provide authority for an evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

BLASTING AND USE OF EXPLOSIVES

Generally

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986) 93 I.D. 199

CESSATION ORDERS

Generally

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

CIVIL PENALTIES

Generally

A document styled as an "application for review" filed within 30 days of receipt of a proposed assessment of a civil penalty will not be considered an application for review of a notice of violation or cessation order where the record shows the person filing the document was served with the notice of violation or cessation order more than 30 days prior to the filing; however, the document may be considered to be a petition for review of a proposed civil penalty.

Under sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of the civil penalty by one seeking review is essential to establish the jurisdiction of the Hearings Division to hear the petition for review or the Board of Land Appeals to entertain a petition for discretionary review.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement, Daryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 371 (July 1, 1986)

Amount

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of $750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 196 (Jan. 28, 1986) 93 I.D. 1

Negligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory

CIVIL PENALTIES--Continued

Negligence--Continued

violation penalty of $750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

Progress

Under sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR § 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of the civil penalty by one seeking review is essential to establish the jurisdiction of the Hearings Division to hear the petition for review or the Board of Land Appeals to entertain a petition for discretionary review.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement, Darryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 391 (July 1, 1986)

ENFORCEMENT PROCEDURES

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

ENVIRONMENTAL HARM

Generally

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

FEDERAL LANDS

Cooperative Agreements

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 19, 1986) 93 I.D. 417

Mining Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 2[illegible] (Nov. 19, 1986) 93 I.D. 417

Permits

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which

PERMITS--Continued

Permits--Continued

causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Continent Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 8 (Dec. 18, 1986)

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)
93 I.D. 417

HEARINGS

Generally

OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is unrebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 10, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 194 (Aug. 15, 1986)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 387 (Nov. 28, 1986)

HYDROLOGIC SYSTEM PROTECTION

Generally

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, so relief is appropriate where, under a

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections, OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)
93 I.D. 417

INSPECTIONS

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

10-day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

The Secretary of the Interior through OSM properly has jurisdiction to issue notices of violation in states with approved programs, where OSM acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSM issues a 10-day notice and the State fails to take action to ensure abatement of the violations.

Pannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

NOTICES OF VIOLATION

Specificity

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 93 IBLA 387 (Nov. 28, 1986)

Specificity

A notice of violation issued pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), which does not set forth with reasonable specificity the nature of the alleged violation is properly vacated.

Office of Surface Mining Reclamation & Enforcement v. Knell L. Spradlin Coal Co., 93 IBLA 386 (Sept. 17, 1986)

A violation is described with reasonable specificity and satisfies the requirements of sec. 521(a)(5) of the Act where a surface mining site has been subdivided into separate sections, and specific findings as to highwalls and remedial work required are made with respect to such sections. An allegation on appeal that such findings are either indefinite or provide inadequate notice will not be sustained where, during the course of the proceeding, two hearings were held, the operator was given ample opportunity to present all aspects of his case, and, after the decisions were rendered, failed to utilize the opportunity to seek clarification of what reclamation work was required.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

PERMITS

Approval

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1268(c) (1982).

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its

PERMITS--Continued

Approval--Continued

permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 93 IBLA 269 (Nov. 18, 1986)
93 I.D. 417

Hearings

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

Modifications

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to potential liability under the Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Reclamation Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 93 IBLA 269 (Nov. 18, 1986)
93 I.D. 417

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

PERMITS--Continued

Temporary Relief

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 8 (Apr. 30, 1986)

PRIME FARMLANDS

Generally

Where surface mining permits are granted under a State-approved program for areas that include "prime farmland" and the permittee classifies the post-mining use of all the permit area as "pastureland," in light of the fact the Surface Mining Control and Reclamation Act of 1977 and Federal regulations implementing the Act in 30 CFR Part 715 along with State regulations under the State program require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area, OSM may properly issue NOV's after the State has failed to act in response to 10-day notices to require the permittee to provide crop-yield data showing compliance with cited State and Federal regulations.

Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

PUBLIC HEALTH AND SAFETY

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

RECLAMATION FEES

Liability

"Operator." Identification of the "operator" responsible for payment of reclamation fees under sec. 802(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a literal interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

RECLAMATION FEES--Continued

Liability--Continued

the coal is responsible for payment of the reclamation fees.

When an operator has made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and when that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which conforms with the requirements of 31 U.S.C. § 3716 (1982).

McKane Coal Co., Inc., 93 IBLA 1 (Dec. 11, 1986) 93 I.D. 460

STATE PROGRAM

Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 1271(b) of SMCRA

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 16, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 194 (Aug. 15, 1986)

Where surface mining permits are granted under a State-approved program for areas that include "prime farmland" and the permittee classifies the post-mining use of all the permit area as "pastureland," in light of the fact the Surface Mining Control and Reclamation Act of 1977 and Federal regulations implementing the Act in 30 CFR Part 715 along with State regulations under the State program require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area, OSM may properly issue NOV's after the State has failed to act in response to 10-day notices to require the permittee to provide crop-yield data showing compliance with cited State and Federal regulations.

The Secretary of the Interior through OSM properly has jurisdiction to issue notices of violation in states with approved programs, where OSM acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSM issues a 10-day notice and the State fails to take action to ensure abatement of the violations.

Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

10-day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie

STATE PROGRAMS--Continued

10-day Notice to State--Continued

case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)
93 I.D. 199

STATE REGULATION

Generally

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to potential liability under the Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 10, 1986)

TEMPORARY RELIEF

Significant, Imminent Environmental Harm

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 9 (Apr. 30, 1986)

VARIANCES AND EXEMPTIONS

2-Acre

While, in general, under the Surface Mining Control and Reclamation Act of 1977 surface coal mining operations may not be conducted without first obtaining a permit from either a state agency or OSM, the Act does not apply to the extraction of coal for commercial purposes when the surface mining operation affects 2 acres or less.

A party contesting OSM's jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based, and it must not only come forward with supporting evidence but also must carry the ultimate burden of persuasion if OSM attempts to rebut the evidence.

Under 30 CFR 700.11(b), where an entity that is extracting coal intends to affect more than 2 acres, that entity is not exempted from coverage under the Surface Mining Control and Reclamation Act of 1977

VARIANCES AND EXEMPTIONS--Continued

2-Acre--Continued

regardless of whether or not it has actually affected 2 acres.

Office of Surface Mining Reclamation & Enforcement v. Clear Coal Co., 90 IBLA 18 (Sept. 19, 1986)

WORDS AND PHRASES

"Operator." Identification of the "operator" responsible for payment of reclamation fees under sec. 402(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a literal interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes the coal is responsible for payment of the reclamation fees.

McWane Coal Co., Inc., 93 IBLA 1 (Dec. 11, 1986)
93 I.D. 460

SURVEYS OF PUBLIC LANDS

GENERALLY

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr., Verna I. Carter, 89 IBLA 286 (Feb. 13, 1986)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Pettig, 90 IBLA 323 (Feb. 24, 1986)

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

"Prior to passing title from the United States, the Government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. Where, pursuant to a cadastral resurvey, all lands have been patented to private owners, disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located.

Sarah E. Wagle Calvin, 94 IBLA 162 (Oct. 28, 1986)

DEPENDENT RESURVEYS

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

Prior to passing title from the United States, the Government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. Where, pursuant to a cadastral resurvey, all lands have been patented to private owners, disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located.

Sarah E. Wagle Calvin, 94 IBLA 162 (Oct. 28, 1986)

OMITTED LANDS

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shore line rather than the meander line is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully

SURVEYS OF PUBLIC LANDS--Continued

OMITTED LANDS--Continued

the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which or its face purports to convey the claimed land to the applicant or the applicant's predecessors-in. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James E. Gaylord, Jr., 94 IBLA 382 (Dec. 9, 1986)

TAYLOR GRAZING ACT

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4160.1 (b)(7), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Joe B. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 260 (June 12, 1986)

TIMBER SALES AND DISPOSALS

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case filed remanded for supplementation of the EA to consider the alternative which it failed to study.

State of Wyoming Game & Fish Comm'n, 91 IBLA 364 (Apr. 24, 1986)

TOWNSITES

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Klawock, 94 IBLA 167 (Oct. 7, 1986)

TOWNSITES--Continued

The occupants of townsite lots at the time of approval of subdivisional survey are entitled to deeds to those lots from the townsite trustee pursuant to the regulation at 43 CFR 2565.3(c). An application for deed filed on behalf of a party not in occupancy at the time of subdivisional survey is properly rejected by the trustee.

Bristol Bay Housing Authority, 95 IBLA 20 (Dec. 12, 1986)

TRESPASS

GENERALLY

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

MEASURE OF DAMAGES

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing it and crushing it.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John W. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

GENERALLY

The amounts payable for property acquisitions and for relocation assistance benefits are separate and distinct entitlements, and there is no authority in the Act and the Department's implementing regulations for inclusion in the contract of sale and in the deed to the United States of provisions requiring the vendor/grantor to reimburse the United States for allowed relocation assistance benefits resulting from the acquisition.

Uniform Relocation Assistance Appeal of Kurtz Brothers, Inc., Thomas D. Moriarty (Intervenor), 6 ORA 228 (Aug. 28, 1986)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE

Generally

Persons required to remove their improvements from acquired lands as a result of termination of special use permits previously issued to them by the Park Service involving those lands are not displaced persons within the meaning of the Relocation Act and the Department's implementing regulations, and, consequently, they are not eligible to receive moving payment benefits under the Act.

Persons are not eligible as displaced persons under the Relocation Act and the Department's implementing regulations for moving expenses, or compensation, with respect to removable improvements on lands acquired by the United States from the State of Florida where they had the right or obligation, under terms of a grazing permit from the predecessor in interest to the State of Florida, to remove the improvements upon termination of the permit but failed to do so. Displacement in the circumstances resulted from termination of the permit and not the acquisitions by the State of Florida or the United States.

Uniform Relocation Assistance Appeals of Robert S. Rapp, Jr., et al., 6 ORA 128 (Mar. 24, 1986)

Where claimants commenced occupancy of acquired lands after the lands were acquired by the United States and subsequently moved from the lands upon written notice to vacate from the Park Service, the claimants did not move as a result of the acquisition of the property by the United States and consequently are not eligible as displaced persons for benefits under secs. 202 and 204 of the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. Patrick J. O'Hara & Ms. Sandra Gavin, 7 ORA 28 (Nov. 18, 1986)

Moving and Related Expenses

Generally

Where a person had oral and written contractual authority from a tenant of the record titleholder of real property to stockpile, store, and remove topsoil and gravel material on the property, and such authority did not expire but was terminated by the tenant and the record titleholder jointly, at the request of the Government as a condition precedent to acceptance of an offer to sell the real property concerned and other lands by the record titleholder, loss of the contractual authority was due to the acquisition of the realty by the Government, and the person whose contracts were so terminated is properly considered a displaced person eligible for allowable moving costs and related expenses under sec. 202 of the Act and implementing regulations of the Department with respect to its topsoil and gravel materials remaining on the lands at the time of the Government's acquisition of the lands

Where stockpiled topsoil and gravel materials, prepared and processed for marketing purposes, have been leveled by the record titleholder of the lands and his tenant, at the request of the Government as a condition precedent to acceptance of an offer to sell the real property concerned and other lands by the record titleholder, the owner of the materials is entitled, as a displaced person, to a benefits payment in the amount of the fair market value of this personal property for continued use at its location at the time of displacement, or the estimated cost of moving it within a radius of 50 miles, whichever is less, under

sec. 207 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of Hurtz Brothers, Inc., Thomas D. Moriarty (Intervenor), 8 OHA 228 (Aug. 28, 1986)

A payment of $7,333.33 in accordance with 42 U.S.C. § 4622 (1982), for a license to remove boulders and other materials is reasonable in light of the relatively insubstantial legal rights of such a property interest.

Uniform Relocation Assistance Appeal of Forrest L. & Dona M. Harmon, 7 OHA 34 (Dec. 17, 1986)

Replacement Housing Payment for Homeowners

Generally

Persons who moved and were residing elsewhere prior to the time the United States acquired their real property and prior to receiving a written notice from the United States to vacate the property, are not persons who moved from the property as a result of its acquisition by the United States, and, therefore, they are not displaced persons eligible for homeowners' replacement housing payment benefits under sec. 203 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of Mr. & Mrs. George E. Darling, 6 OHA 216 (Aug. 18, 1986)

WILD FREE-ROAMING HORSES AND BURROS ACT

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John N. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

A person claiming ownership of wild free-roaming horses on the public lands must present evidence of ownership to the authorized officer who may issue authorization for a roundup, specifying a reasonable time to effect gathering of the animals claimed. The criterion as to reasonable time is set where BLM has recognized a claim for 5 years and has granted four extensions during that period to effect gathering. Where the successor in interest to the original claimant presented a claim to an uncertain number of progeny, remote by several generations from the animals of the original claim, BLM properly refused to recognize such claim.

Raymond G. Rosenlund, 94 IBLA 308 (Nov. 21, 1986)

WITHDRAWALS AND RESERVATIONS

GENERALLY

Under 43 U.S.C. §§ 155-158 (1982), known as the Engle Act, the Secretary of the Interior is authorized to process Department of the Defense applications for national defense withdrawals. Where such applications aggregate 5,000 acres or more for any one project or facility, the withdrawal may only be made by an Act of Congress, except in time of war or national emergency, and except as otherwise expressly provided in the Act.

Dept. of the Army, 95 IBLA 92 (Dec. 19, 1986)

EFFECT OF

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George P. Krier, 92 IBLA 101 (May 30, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively the location made while the lands were segregated from mineral entry.

Harold E. De Roux, 93 IBLA 350 (Nov. 28, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

POWERSITES

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corrica, 93 IBLA 386 (Sept. 11, 1986)

POWERSITES--Continued

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 378 (Dec. 4, 1986)

REVOCATION AND RESTORATION

The Board of Land Appeals does not have the authority to modify the terms of a properly issued public land order selectively revoking a withdrawal.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

STATE SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Hilderback, 90 IBLA 319 (Feb. 25, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon K. Griffin, 92 IBLA 87 (May 28, 1986)

WORDS AND PHRASES

"Improvements." As used in sec. 995(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

Eugene M. Witt, 90 IBLA 338 (Feb. 26, 1986)

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit," as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 15, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

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